TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906

No. 23.

HONOLULU RAPID TRANSIT AND LAND COMPANY, APPELLANT,

vs.

JAMES L. HOLT, ASSESSOR.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED FEBRUARY 18, 1907.

(20,578.)

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vs.

JAMES L. HOLT, ASSESSOR.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 12, 1907.

1 SCHEDULE "I."

"If any of the property by this Chapter directed to be returned shall consist of real and personal property or several classes or kinds or parcels of real or personal property, respectively, which are combined and made the basis of an enterprise for profit, the person making the return shall give a detailed description of such property and state the aggregate value thereof, taking into consideration the net profits made by the same, also the gross receipts and actual running expenses, and where it is a company, being a corporation whose stock is quoted in the market, the market price thereof, as well as all other facts and considerations which reasonably and fairly bear upon such valuation. He shall state what, if any, the net profits, as well as the gross proceeds and actual running expenses of such enterprise have been during the twelve months next preceding; and, if known, what sale or sales of stock or other interests in such enterprise have taken place during the twelve months next preceding, giving the name of the person selling, the person buying, the number of shares or proportion of interest sold upon each sale; and when known, the purchase price thereof." (Sec. 1228 R. L. 1905.)

"In ascertaining the aggregate value of the property constituting the basis of an enterprise for profit, there shall first be included all property combined and forming the basis of such enterprise whether within the definition of real or personal property set forth in this chapter or not and there then shall be deducted therefrom the value of shares in other Hawaiian corporations, held or owned by such enterprise, the value of all property on which specific taxes are levied and the value of all property that would not be taxable if not so combined and made the basis of an enterprise for profit." (Section 1216 R. L. & Act 88 S. L. 1905.)

Information Required from Corporations, Firms, or Individuals in Estimating Aggregate Value of the Combined Property which is the Basis of Business Enterprise for Profit, Required by Sections 1216 *and* 1228, *R. L., and Act* 88, *S. L.* 1905.

Statement of person making the return for past year's business.			Amount.
Amount Gross Receipts or proceeds for year to December 31, 1905	From operation	323193.76	342,088 95
	Rents	4775.57	
	Sale of stock	7000.	
	Sales of material	7119.67	
Total Actual Running Expenses for year to December 31, 1905	Expenses of operation	201649.02	258,951 72
	Taxes	14933.22	
	Car licenses	524.00	
	Bond interest	41400.	
	Sundry	4457.48	
Amount Net Profits for year to December 31, 1905			83,137 23
Amount Paid in Dividends during year to Dec. 31, 1905, per cent	Pref., 6%		52,889 50
	Comm., 4%		

Amount of Bonded Indebtedness on January 1, 1906, 690 No. Bonds @ $1000.00	
Market Price of Bonds on January 1, 1906, — No. Bonds @ $1008....	690,000
Number Shares Paid-up Stock on January 1, 1906, 1150 No. Shares @ $100	
Market Price per Share Paid-up Stock on January —, 1906, — No. Shares @	1,150,000
Number Shares Assessable Stock on January 1, 1906, *nil* No. Shares @ $—	
Market Price per Share Assessable Stock on January 1, 1906, — No. Shares @ $—	
No. Shares issued, sold or transferred during year to Dec. 31, 1905, issues to Transfers 1991, 2061 No. Shares @ $—	
Present number of Shares, 1150 No. Shares @ $100	1,150,000
Capital..... $1,150,000 Paid-up Capital..... $1,150,000	

(Pref., $101.50)
(Comm., 66.)

Remarks.

3500 Pref'd @ $101.50 =.....	355,250	Assessment under Act 88, Sec. 1216 S. L. 1905.....	350,000
8000 Com. @ 866 =.....	528,000		800,000
708 Bonds 1008 =.....	690,000		690,000
	1,573,250		1,840,000
Less exemption.....	8,930	Less exemption as per #865...	8,930
	1,564,320		1,831,070

TAX ASSESSMENT SCHEDULE.

Statement of Property Belonging to, in the Possession of, or under the Control of (Name) Honolulu Rapid Transit & Land Co., District of Honolulu, Island of Oahu; P. O. Address, Honolulu; Residence, No. —; Office, Alapai Street.

Real Property.

(The term "Real Property" for the purposes of this Act shall mean and include all lands, and town lots and house lots with the buildings, structures, fences, wharves, improvements and other things erected on or affixed to the same.) S. 1214 R. L., 1905.

In describing Town Property, give No. of R. P. or Grant and L. C. A., Location, Area in square feet, Frontage in linear feet, Class (whether business or residence property), Value of Land, and value of Improvements separately stated.

In describing Acreage or Country Property give No. of R. P. or Grant and L. C. A. under which the land is held, Name of Ili and Ahupuaa in which situated, Area, Class (whether Pasture, Rice, Taro, Forest Irrigated or Unirrigated Cane Land, etc., etc.) Value of Land and Value of Improvements.

Description and Situation of Land and Improvements.

SCHEDULE "A."

No. royal patent or grant.	No. land com. award.	Frontage on street in feet.	Area, sq. feet or acres.	Class.	Location or situation.	Value of land.	Value of improvements.
501	.....	223 331 266	2.05	Res.	Beretania, Alapai & Young Sts., Honolulu.	$17859	$95171
7789	7713	.....	13.92	"	Makai side of King St. end of Baseball Grounds.	5568	100
1666	8515	.....	9.10	"	Corner Waialae & Palolo Rds.	3640	
177	.....	.....	4.00	"	Baseball Grounds, Beretania & King Sts.	4000	2500
		150x 200	.69	"	Beretania St. between Punahou & Alexander Sts.	3600	500
		100	.26	"	Makai side of King St. opp. Kamehameha IV Rd.	500	200
		202	1.39	"	Beretania St. to Hotel St. (Thrum Property).	12099	16000
			.26	"	Waikiki side of Nuuanu St. opp. Bater St. being that property used as an adjunctive to Pacific Heights Ry. extending from Nuuanu St. to Railway Bridge.	1121	726
			11213				
					Total.....	$48387	$115197

Lessor's Return of Real Property Leased.

SCHEDULE "B."

Information Required: All Leases * * * with the name and residence of the person to whom such Leases * * * are made * * * Sec. 1216 R. L. 1905.

No. R. P. or grant.	No. L. C. A.	Frontage.	Area, acres.	Class.	Date of lease.	Term of lease, years.	Annual rent.	Location.	Name of lessee or to whom leased.	Value of lessor's interest in —	
										Land.	Improvements.
177	.....	....	400	Res.	Ap. 24, '03	5	$900	Baseball Grounds, Beretania & King Sts.	Honolulu Baseball Ass'n.	$	$
								Totals.....	.....	$	$

Personal Property.

Definition of Personal Property.

The term "Personal Property" for the purposes of this Act shall mean and include all household furniture and effects, jewelry, watches, goods, chattels, wares and merchandise, machinery, Hawaiian ships or vessels, whether at home or abroad, all moneys in hand, leasehold and chattel interest in land and real property, franchises, patents, contracts, growing crops, public stocks and bonds not exempted by law from taxation and all animals not herein specifically taxed. (Sec. 1215 R. L., 1905.)

Lessee's Return of Property Leased.

SCHEDULE "C."

No. R. P. or grant.	No. L. C. A.	Frontage.	Area in acres or square feet.	Class.	Date of lease.	Term of lease, years.	Annual rent.	Location of property.	Name of lessor or from whom leased.	Value lessee's interest in—	
										Land.	Improvements.
		155	1.40	Res..	May 14, '89	20 from 6, 1, '89	$150	King St. off Pumping Stat....	Trs. Bishop estate ..	$1000	$200
				Res..	May 5, '90	30 from 3, 1, '87	600 00	Makai side King St. bet'n Bethel & Nuuanu.	E. B. Thomas.....		
		100	69	Res..	Aug. 8, '03	20 from 1, 1, '90	.....	Lots 127 & 128 Kapiolani P'k.	J. B. Castle	5000	9850
				Res..	Sept. 11, '00	16 from 6, 1, '01	75 00	Makai side King St. opp. Kamehameha IV Rd.	Mary Barete	500	*Nil.*
		174	.....	Res..	Feb. 18, '04	20 from 11, 1, '99	475	King St. to Young St. on line with Alexander St.	Magoon & Lightfoot.	2200	4800
		227	.....	Res..	Feb. 18, '04	17 yrs. 9 mos. from 4, 1, '01.	360	Young St. to Beretania St. on line with Alexander Street.	Magoon & Lightfoot.	1500	
								Totals	.....	$	$

Above mentioned leased properties sub-leased as follows:

SCHEDULE "CC."

No. R. P. or grant.	No. L. C. A.	Frontage.	Area in acres or square feet.	Class.	Date of lease.	Term of lease.	Annual rent.	Location of property.	Name of sub-lessee or to whom sub-leased.	Value of sub-lessor's interest in—	
										Land.	Improvements.
					Jan. 1, '03	5 yrs	$720	Mauka side King St. bet'n Bethel & Nuuanu.	Yet Soy Co.....	$900	
								Totals	.....	$	$

JAMES L. HOLT, ASSESSOR.

Live Stock Schedule.

SCHEDULE "D."

	Number.	Value per head.	Value.
Bulls (Hawaiian)			
" (Imported)			
Cattle (Herd) Hawaiian Stock, including Calves			
Cattle (Herd) Foreign Stock, including Calves			
Cattle (Working)			
Cattle (Milch Cow) Hawaiian Stock			
Cattle (Milch Cow) Foreign Stock			
Horses (Native) broken			
Horses (Foreign) broken			
Horses (Herd) unbroken			
Stallions (Native)			
Stallions (Imported)			
Brood Mares (Native)			
Brood Mares (Foreign)			
Jacks (Imported and Native)			
Donkeys (Native)			
Mules (Native)			
Mules (Foreign)	6	125	$750
Sheep			
Pigs			
Poultry			
"D" Totals			$750

4

Personal Property.

SCHEDULE "E."

	Value.
Agricultural, Garden Implements and tools on hand	
Blacksmith, Carpenter Tools and Shop Equipments	
Building Material on hand	
Cash in hand	
Cash in Agents' hand- (Not Deposited in Banks)	$10804 24
Coal—No. Tons, — Fuel Oil @ $— per Ton	
Growing Crop of Cane, as per Schedule "H"—No. Acres—@ $— per Acre	290 08
Growing Crop of Rice, Taro Bananas and Vegetables—No. Acres—@ $— per Acre	
Goods, Wares and Merchandise and of what general kind (on hand).	
" " " " " " " " " "	
" " " " " " " " " "	
" " " " " " " " " "	
" " " " " " " " consigned to you.	
Railroads—Miles, 25.13; Value, $240233.57; Portable Tracks, 1692; Value, $475.00	
Rolling Stock	240708 57
Steam Plows including Spares (complete)	179776 61
Business Furniture and Fittings (in use)	
Household Furniture and Effects (in use) including Silverware, Books and Ornaments	1668 46
Hides or Skins	
Wool—Tons—; Value per ton, $—	
Jewelry of all kinds for personal use (including Watches)	
Sugar Mills and Machinery (not including Buildings)	

Machinery of all kinds in use (other than sugar)	128481 62
Sugar or Molasses, in Tanks or Coolers — tons — gallons	
Sugar or Molasses on hand — tons	
Paddy—Tons — ; Value per ton $—	
Rice—Tons — ; Value per ton $—	
Ships, Vessels, at home or abroad	
Yachts and Boats	
Contracts, Franchises and Patents	
Personal Property of any kind, not included in this Schedule—Tramway Material (junk)	1000
"E" Totals	$562688 58

Specific Taxes.

Definition of Specific Taxes.—The term "Specific Taxes" for the purposes of this Act, shall mean and include, all Brake Tax, Sulky Tax, Ox-cart Tax, Automobile Tax, Cart Tax, Dray Tax, Wagon Tax, Wagonette Tax, Omnibus Tax, Hearse Tax, Carriage Tax, Bicycle Tax and Dog Tax. (Section 1215B, Act 89, S. L., 1905.)

	Number.	Rate.	Tax.
Bicycles including Tags		$1 10	
Automobiles used for conveyance of persons, freight or merchandise		20 00	
Carriages, Wagons, Wagonettes, Hearses, Omnibuses, Drays, Carts, and other vehicles not herein specified, used for conveyance of persons, freight or merchandise	4	5 00	20
Brakes and Sulkies used for conveyance of persons, freight or merchandise		2 00	
Dogs (Male or Female), including Tags		1 10	
Total Specific Taxes			$

Summary.

	Value.	Tax.
Total Schedule "A"	$163584.00	$1635.84
" " "B"		
" " "C" & "CC"	25950.00	259.50
" " "D"	750	7.50
" " "E"	562688.58	5626.88
Total Specific Taxes		20
Total	752972.58	7549.72
Less Exemption of $300 (provided the taxpayer be a resident of this district)	8930.81	89.30
Net Total	$744041.77	$7460.42

Return of Business Enterprises

Under Sections 1216 and 1228, R. L., and Act 88, S. L. 1905.

SCHEDULE "G."

Aggregate Value of the combined Real and Personal Property which is the basis of the business enterprise for profit known as (Title) Honolulu Rapid Transit & Land Co. Value, $

5 *Personal Taxes.*

Definition of Personal Taxes.—The term "Personal Taxes" for the purposes of this Act, shall mean and include the Poll Tax, Road Tax and School Tax. (Section 1215A, Act 89, S. L., 1905.)

List of Male Persons in My Employ or Residing with Me Subject to Taxation.

Name.	Age.	Nationality.	Name.	Age.	Nationality.
.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....

I do solemnly swear that the lists herein contained, and the values herein stated, are true and correct to the best of my knowledge, information and belief, so help me God.

(Sg.) C. G. BALLENTYNE,
Manager H. R. T. & L. Co.

Address ——.

Subscribed and sworn to before me this 12 day of Feb'y, A. D. 1906.

(Sg.) CHAS. T. WILDER,
Deputy Assessor and Tax Collector.

[Endorsed:] S. C. No. 151. Registered Vol. 1, page 125. Filed Aug. 3, 1906. (Sg.) J. A. Thompson, Clerk. Blanks below to be filled out at Tax Office. Property Tax Assessment Schedule for the District of Honolulu, Island of Oahu, Territory of Hawaii, 1906. Statement of Honolulu Rapid Transit & Land Co., Book 6, Block Kulaokahua. Received January 31, 1906. 1905 Book 6. 1906 Book 6 37/44. Notice Forwarded on 3/31/06. (Sg.) A. W. Neely, Deputy Assessor. Notice.—This Tax Schedule must be filled out properly and filed at the Tax Office between the 1st and 31st days of January in each year. Personal Taxes are due on January 1st and become delinquent on March 31st. All Specific and all Property Taxes are due and payable after January 31st of each year. All Specific and one-half of the Property Taxes not paid on May 15th of each year become delinquent; the balance of the Property Taxes not paid on November 15th of each year become delinquent. All delinquent taxes are subject to a penalty of 10 per cent. and interest at rate of 10 per cent. per annum, as provided by law. I hereby certify that the within return is a true copy of the original on file in my office. (Sg.) James L. Holt, Assessor 1st Division.

(Here follows list of taxpayers, marked pp. 6 and 7.)

List of Tax Payers for 1902 in the District of Honolulu

Memo Page	No	NAME ~~Initials~~ and address	R.P. ~~Kuleana No.~~	L.C.A. ~~Kuleana~~	Situation and Kind ~~Kahi i kū a me ke ano~~
					Lands Beretania Av
R	421	Honolulu Rapid Transit & Land Co. Ltd	501		Sts Improvements
	422		7789	7713	Lands makai and Improvements
	423		1666	8575	Lands cor. Maiala
			177		Lands Beretania and grounds to Hon.
	424				Improvements
					Lands Beretania & bet. Alex
	425				Improvements
					Lands makai King St.
	426.				Improvements
			108		
			208		Lands Beret. St. to Hale
	427				Improvements
					Lands Punamu St. ex extending from Nu
	428				Improvements
					Legal holds King St. opp. Station fr. Bishop St.
	429				Improvements
					Leo of holds mauka fr. R.R. Premises
	430				Lease holds Kapi P 7/25 ft. J.B. Castle nil Imp Improve
					Y
					Amo

Island of Oahu — Showing the Kind and Value of Property, Assessments and Collections, Div

and Kind of Property	Area	Frontage	Value of Real Estate	Value of Personal Property	Exemption	Total Value of Real Estate	Total Value of Personal Property	Carriages	Carts and Drays	Bicycles	Dog	Poll	Road	School	Total Value of Taxes	Tax Per Cent	Interest	Advt'g. Cost	Costs
			Waiwai i'o o ka Aina	Waiwai i'o o na Waiwai Lewa		Huina Waiwai i'o o ka Aina	Huina Waiwai i'o o na Waiwai Lewa	Kaa Lealea	Kaa Kauo me Kikaho	Kaa Hehi Wawae	Ilio	Kino	Alanui	Kula	Huina Waiwai i'o o na Auhau	Uku Pane	Uku Panee	Hoohala	Koina
Amoi. Kapaai & Jung	1.	223																	
Amount brought forward	2.05	661 766																	
ements 150 000																			
ai side of King St Kaimuki baseball grounds ements 100	13.92																		
ialea & Palolo Rds	9.10																		
King Sts baseball ements																			
St bet. Punahou & Alexander ements 25 00	.69	100 200																	
ng St. opp. Kam III Rd ements 200	.26	100																	
to Hotel St & Drum Roads ements Veranda	.39	202																	
St. opp. Bates St. Pac. on Nuuanu St to Railway ements 726.	.26	St. Roads Bridge																	
St opp. Palama Summit ub. 20 yrs 6/1/1876 ements 200	1.40	185 $100 per yr.																	
uka King St bet Bethel & Nuuanu ents 30 yrs. 3/1/1876 Paid 1st 1/2 1/2 127 ette 20 yrs 1/1/90 provements 9812	0660 .69	Kings 100																	
Forwarded																			
Amount carried forward																			

Showing the Kind and Value of Property, Assessments and Collections, Divisions of Taxes and Time of Payment.

Total Value of Real Estate. Huina Waiwai I'o o ka Aina	Total Value of Personal Property Huina Waiwai I'o o na Waiwai Lewa	Carriages Kaa Lealea	Carts and Drays Kaa Kaao me Kikano	Bicycles Kaa Hehi Wawae	Dog Ilio	Poll Kino	Road Alanui	School Kula	Total Value of Taxes Huina Waiwai I'o o na Auhau	Ten Per Cent Umi Pa Keneta	Interest Uku Paaea	Advt'g. Cost Hoohala	Costs Koina Aha	Delinquent Taxes Na Auhau Uku olola	No. of Receipt Helu Palapala Hoo-kaa	REMARKS Olelo Hoakaka

List of Tax Payers for 1906 in the District of Honolulu Island of Oahu Showing the

Memo Page	No. Hole	NAME and address	R. P. Pelepeka Alia, Kuli	L. C. A. Kuleana	Situation and Kind of Property Kahi i ku o i a me ka ano o ke Waiwai.	Area Ka Nui	Frontage Kona o kapaa i ka	Value of Real Estate	Value of Personal Property Waiwai o ke Kanaka Waiwai Ohua	Exemption Hookuia	Total Value of Real Estate Waiwai Waiwai o ke Aina	Total Value of Personal Property Waiwai Waiwai o ke Kanaka	Carried Forward
		Honolulu Rapid Transit			Amount brought forward								
	431	and Land Co. Lot			Leasehold Kalihi, makai King St opp. Kam Sch Lot 16 yrs 6/1/01 @ $70 per yr pukapuka kauoha	500							
	432				Leasehold King to Waiakamilo Co 20 yrs 11/1/96 @ $75 per yr. Improvements 4500	2000 sq ft	Front						
	433				Leasehold Young to Kaetamai	1500	45 ft.	227					
	434				Wagon & Sign Paint 18 yrs. 4/1/01 @ $60 per yr 6 Native huelo Kuleana in Kalihi 1804.24								
	435				Steel R.R. 49.00 2.6130 R.R. miles 1692 Portable Tracks			31000					
					Rolling Stock 20000 Business Furniture & Fixtures			1488.46					
					Machinery of all kinds (Junk) 12848.62 Tramway 2000 Material						18640.10	18640.10	2
	436				Contracts, Franchise & Patents 5000 Tools & Fixtures			915500	915500				
					Amount carried forward								

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Hilo — Showing the Kind and Value of Property, Assessments and Collections, Divisions of Taxes and Time of Payment.

Personal Property Waiwai Kaulana	Exemption Hookuuia	Total Value of Real Estate Waiwai Kuaaina	Total Value of Personal Property Waiwai Kaulana	Carriages Kaa Kaulua	Carts and Drays Kaa Kauome Kikaae	Bicycles Kaa Hehi Wawae	Dog Ilio	Poll Kino	Road Alanui	School Kula	Total Value of Taxes Huina Waiwai Poono Auhau	Ten Per Cent Umi Pa Keneta	Interest Uku Paneo	Advt'g. Cost Hoohala	Costs Koina Aha	Delinquent Taxes Na Auhau Uku oleia	No. of Receipt Helu Palapala hoike	REMARKS Olelo Hoakaka
		180.00	186.10	20													4260	
15500																		

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Filed July 26/05
Thos J. A. Thompson
Clerk

8 Book —.

OFFICE OF ASSESSOR AND COLLECTOR OF TAXES,
March 31, 1906.

Honolulu Rapid Transit and Land Company. Received 4/2/06.

Hon. Rapid Transit and Land Co., Alapai St.

GENTLEMEN: In accordance with Section 1243 of the Revised Laws of Hawaii as amended by Act 89 of the Session Laws of 1905, you will please take notice that certain items in your Property Tax return have not been accepted by the Assessor, the same being changed as below:

R. P. or grant.	L. C. A.	Description of property.	As returned by you.	As changed by assessor.
501	.....	Beretania, Alapai, Young Sts.....	17859	25000
		Improvements.....	95171	
7789	7713	Makai side King St.....	5568	
		Improvements.....	100	
1666	8515	Waialae & Palolo Sts.....	3640	
177	.....	Baseball Grounds King & Beretania.		
		Improvements.....		
		Beretania St.....	3600	4250
		King St. Kalihi Kai.....	500	
		Improvements.....	200	
		Beretania to Hotel Sts.....	12099	16000
		Improvements.....	16000	
		Nuuanu St. adj. Pacific Heights.....	1121	2240
		Improvements.....	726	
		King St. to Baseball Ass'n.....	.....	4000
		Improvements on Beretania St.....	500	2500

If you have any reason to offer why the return should not stand as changed, please call at the Tax Office at your earliest convenience.

You are privileged to note an appeal from the above assessments by filing due notice thereof with the Assessor on or before the 15th day of May next, otherwise no changes whatsoever will be allowed in said assessments.

Yours respectfully,

(Sg.) A. W. NEELY,
Deputy Assessor.

[Endorsed:] S. C. No. 151. Registered vol. I, page 126. Filed July 26/06. (Sg.) J. A. Thompson, clerk.

9

Book —.

OFFICE OF ASSESSOR AND COLLECTOR OF TAXES,
—— —, 190–.

Hon. Rapid Transit & Land Co.:

In accordance with Section 1243 of the Revised Laws of Hawaii as amended by Act 89 of the Session Laws of 1905, you will please take notice that certain items in your Property Tax return have not been accepted by the Assessor, the same being changed as below:

R. P. or grant.	L. C. A.	Description of property.	As returned by you.	As changed by assessor.
		Leasehold Int. Schedule C.....	10200	
		Improvements " C.....	14850	
		Live Stock " D.....	750	
		Personal Property " E.....	562688 58	
		Contracts Franchise & Patents..	.....	500,000
		Aggregate Value of the Combined Real and Personal property which is the basis of the business enterprise for profit known as Hon. Rapid Transit & Land Co.....	.....	1831000
		Specific Tax.....	20	

If you have any reason to offer why the return should not stand as changed, please call at the Tax Office at your earliest convenience.

You are privileged to note an appeal from the above assessments by filing due notice thereof with the Assessor on or before the 15th day of May next, otherwise no changes whatsoever will be allowed in said assessments.

Yours respectfully,

(Sg.) A. W. NEELY,
Deputy Assessor.

[Endorsed:] S. C. No. 151. Registered vol. I, page 125. Filed July 26, 1906. (Sg.) J. A. Thompson, clerk.

10 First Division, Honolulu District.

This is to certify that Honolulu Rapid Transit & Land Co. of this district is assessed for the year 1906, as follows:

	Am't returned.	Am't assessed.
Aggregate value, business enterprise.....		
Real Estate.....	744041	1831000
Personal Property.....		
Dogs.....		
Bicycles.....		
Automobiles.....		
Brakes and Sulkies.....		
Ox-carts.....		
Other Vehicles.....		
Poll, Road and School.....		
Total.....		

That he disputes the following items of such assessment, to-wit:

	Am't appealed.	Am't tax.
Aggregate value, business enterprise.....		
Real Estate.....	10869 58	10869 58
Personal Property.....		
Dogs.....		
Bicycles.....		
Automobiles.....		
Brakes and Sulkies.....		
Ox-carts.....		
Other Vehicles:.....		
Poll, Road and School.....		
Total amount disputed.....		

And has duly appealed from such assessment.

That I have received on deposit the sum of $10 87.00 for the cost of this appeal.

Dated May 12, 1906.

(Sg.) JAMES L. HOLT, *Assessor.*

[Endorsed:] S. C. No. 151. Registered vol. I, page 125. Filed July 26/06. (Sg.) J. A. Thompson, clerk.

11 Tax Appeal Court for the First Division, Island of Oahu, Territory of Hawaii.

Notice of Appeal.

HONOLULU RAPID TRANSIT & LAND COMPANY, a Corporation,
vs.
JAMES L. HOLT, Tax Assessor.

Now comes the Honolulu Rapid Transit and Land Company, a Corporation, by its Attorneys, Castle and Withington, and appeals from the assessment of its property as follows:

Property Belonging to, in the Possession of, or under the Control of the Tax Payer and Assessable as of January 1, 1906.

Returned at, less exemption per section 865 of the Revised Laws of Hawaii	744,041.77
Assessed at	1,831,000.00
Amount appealed from	1,086,958.23

on the ground that said assessment is illegal, void and excessive.

HONOLULU RAPID TRANSIT & LAND COMPANY,
By CASTLE & WITHINGTON,
Its Attorneys.

James L. Holt, Esq., Tax Assessor:

Please take notice that Honolulu Rapid Transit and Land Company has appealed from the assessment to its property as above.

HONOLULU RAPID TRANSIT AND LAND COMPANY,
By CASTLE & WITHINGTON,
Its Attorneys.

12 [Endorsed:] Tax Appeal Court for the First Division, Island of Oahu, Territory of Hawaii. Honolulu Rapid Transit & Land Company, a Corporation, *vs.* James L. Holt, Tax Assessor. Notice of appeal. S. C. No. 151 Registered vol. 1 page 125 Filed July 26/1906. (Sg.) J. A. Thompson Clerk Castle & Withington, Attorneys for H. R. T. & L. Co.

13 Before the Tax Appeal Court of the First Judicial Circuit, Territory of Hawaii.

Appeal No. —.

HONOLULU RAPID TRANSIT & LAND COMPANY, Appellant,
vs.
JAMES HOLT, Tax Assessor, First Division, Appellee.

Decision.

In this case it is shown that the Appellant, Honolulu Rapid Transit & Land Company, returned as the taxable value of its property Seven Hundred and Forty-four Thousand and forty-one Dollars and seventy-seven cents ($744,041.77) and that this amount was increased by the Tax Assessor to One Million Eight Hundred and thirty-one Thousand Dollars ($1,831,000.00), this latter estimate having been made under the provision of Section 1216 of Revised Laws of Hawaii, as amended by Session Laws of 1905, providing for the Assessment of any corporation holding a "public utility" franchise (other than those required to pay a percentage of gross earnings to the Territory) "at not less than the total amount of the par value of the capital issues emitted by such corporation."

The Appellant contends,

That the portion of chap. 88 of Act of 1905 providing for assessment not less than total amount of par value of capital issues is unconstitutional and void;

14 That if constitutional the capital issue of this Appellant is only One Million One Hundred and Fifty Thousand Dollars ($1,150,000.00);

That taxation of the franchise or capital issue is in violation of the rights of the Company under the Act of July 7th, 1898, the Organic Act and the Approval of the President of the United States, under date of June 25th, 1900;

That under said Acts only the tangible property and not the franchise to use that property is taxable;

That the franchise is not assessible;

That under the notice given to this Appellant no raise could be made above the return, excepting for specific items, which could not exceed, including the franchise, One Million Two Hundred and Fifty Thousand Five Hundred and twelve Dollars and thirty-three cents ($1,250,512.33), and that no valid assessment has been made.

As to the Assessment under the provisions of the law for assessment of "public utility" franchises, we find: That the assessor was in error in treating bond issue as a part of the capital issue intended under the law, and that the amount of such capital issue is as contended by Appellant One Million One Hundred and Fifty Thousand Dollars ($1,150,000.00)

As to the constitutionality of the law providing for taxation on the amount of this capital issue, we make no finding as the Assess-

ment hereinafter made is independent of the law in question, being not less than the capital issue as found above.

15 Counsel for Appellant earnestly claim that by Section 30 of the franchise of this Company only tangible property of the Company is subject to taxation, and that "an exemption from taxation for valuable consideration at the time advanced or for services thereafter to be performed constitutes a contract within the meaning of the constitution" and that this franchise is in the nature of such contract.

Admitting that any exemption, privilege or condition of the franchise may not be violated or impaired it remains to be seen how far Section 30, referred to, is in support of the view taken by the Appellant.

Said Section 30 provides for admission of certain material duty free, and further that "the property of the said Association shall not be liable to internal taxation while said railway is under construction, provided that as fast as completed and equipped, the completed and equipped portions shall become liable to such taxation."

We do not find in this section the clear solution of the matter that seems apparent to the Appellant. This Section is primarily a provision for assistance of the Company, by exemption from certain duties and taxes, with further provision for the termination of such tax exemption.

There is no provision or suggestion as to how the value of such completed portion is to be determined—whether upon actual cost of the same, value that the public might be willing to pay for it, or otherwise. We do not find this section which is the only one directly referring to taxation conclusive in the matter.

Further than this, however, Appellant claims that the franchise of this company is a clear contract between the parties thereto,

16 giving the Territory itself an interest therein, and fixing the full consideration therefor, and quotes the rule laid down in case of Stein *ex.* Mayor of Mobile, 49 Ala. 362

"That where corporate authorities had leased water works for a fixed consideration the city could not impose upon the Lessee the obligation of paying a license or tax for the privilege of carrying on the business" and "that the ordinance which attempts this impairs the grant and is void."

We do not find that the taxation of the property of this Company whether specific value be given to the franchise or the same be included in the aggregate value of the whole as an enterprise for profit, comes within the scope of the rule above.

We do not find a tax so levied to be a license for "the privilege of carrying on the business" but a tax on real value of property existing after that privilege has been used. This case appears to us to be analogous to that of a Government lease, under which, for a fixed annual consideration definite in amount (and not subject to contingencies that may never arise), the Government grants the use of certain public property, not infrequently stipulating for the erection of buildings to revert with the lease. We have not heard it contended, nor do we think the Courts would sustain a contention that the

Lessee could have no taxable interest in such leasehold because of the very definite consideration paid for such lease, or that a tax on such leasehold interest was a tax or license on the carrying out of such lease.

We find that the property of this Company is taxable at its true value as the same may be ascertained whether the same be determined by consideration of specific items of which the franchise is one, or by consideration of the value of the whole as an enter-
17 prise for profit shown by income producing power, price of stock or otherwise, and that exemption from the same may not be made unless the same are expressly stated in the law, or if implied so clearly as to leave no reasonable doubt in the mind of the Court.

Under the views expressed above we arrive at a determination of the value of this property by accepting the specific items as returned by the tax payer and adding thereto certain items omitted in the return, and the increase made by this Court in other items, as follows:

Specific items as returned	$744,041.77
To which is added:	
On Beretania Alapai Street property (increase)	7,141.00
On Track Road-bed and overhead structure (increase)	109,291.00
Franchise	500,000.00
Total	$1,360,473.77

An estimate of value based on market price of stocks gives results not dissimilar to the above, and we do find the taxable value of the property of the Honolulu Rapid Transit & Land Co. to be the amount of One Million Three Hundred and Sixty Thousand Dollars ($1,360,000.00).

(Signed) THEO. F. LANSING.
" J. F. BROWN.
" WILLARD E. BROWN.

Honolulu July 24, 1906.

18 [Endorsed:] S. C. No. 151. Registered Vol. 1, page 125. Filed July 26 06. (Sg.) J. A. Thompson, Clerk.

19 Tax Appeal Court of the First Division, Island of Oahu, Territory of Hawaii.

HONOLULU RAPID TRANSIT AND LAND COMPANY, a Corporation,
vs.
JAMES L. HOLT, Tax Assessor.

Notice of Appeal.

Now comes the Honolulu Rapid Transit and Land Company, a Corporation, by its Attorneys, Castle and Withington, and appeals from the decision of said court filed herein on the 25th day of July,

1906, on an assessment of its property, to the Supreme Court of said Territory.

HONOLULU RAPID TRANSIT AND LAND COMPANY,
(Sg.) BALLOU & MARX,
(Sg.) By CASTLE & WITHINGTON, *Its Attorneys.*

To James L. Holt, tax assessor:

Please take notice that the Honolulu Rapid Transit and Land Company has appealed from the decision of the Tax Appeal Court of the First Taxation Division as above.

HONOLULU RAPID TRANSIT AND LAND COMPANY,
(Sg.) BALLOU & MARX,
(Sg.) CASTLE & WITHINGTON, *Its Attorneys.*

[Endorsed:] S. C. No. 151. Registered Vol. 1, page 125. Filed July 26/06. (Sg.) J. A. Thompson, Clerk.

20 Before the Tax Appeal Court of the First Judicial Circuit, Territory of Hawaii.

HONOLULU RAPID TRANSIT & LAND COMPANY, LIMITED, a Corporation, Appellant,
vs.
JAMES HOLT, Tax Assessor, First Division, Appellee.

Appeal and Notice of Appeal.

Now comes James L. Holt, Tax Assessor of the First Taxation Division of the Territory of Hawaii, and hereby gives notice of appeal and does hereby appeal to the Supreme Court of the Territory of Hawaii from the decision of the Tax Appeal Court of the First Judicial Circuit of the Territory of Hawaii, made, rendered, signed, and entered by said Court in the above entitled cause on the 25th day of July A. D. 1906.

Dated Honolulu, July 26, A. D. 1906.

(Signed) JAMES L. HOLT,
Tax Assessor, First Taxation Division.

21 [Endorsed:] Before the Tax Appeal Court of the First Judicial Circuit, Territory of Hawaii. Honolulu Rapid Transit & Land Company, Limited, a corporation, appellant, *vs.* James L. Holt, tax assessor, first division, appellee. Appeal and notice of appeal. S. C. No. 152. Registered Vol. 1, page 126. Filed July 26/06. (Sg.) J. A. Thompson, Clerk. E. C. Peters, Att'y Gen'l for appellee.

22 Before the Tax Appeal Court of the First Judicial Circuit, Territory of Hawaii.

Property Tax Appeal No. —.

HONOLULU RAPID TRANSIT & LAND COMPANY, Appellant,
vs.
JAMES HOLT, Tax Assessor, First Division, Appellee.

Certificate of Appeal.

I, Theodore F. Lansing, Chairman of the Tax Appeal Court for the First Taxation Division, Territory of Hawaii, do hereby certify that a hearing in the above entitled case was had before this Court on the following appeal of the Honolulu Rapid Transit and Land Company, a corporation, from the assessment levied by the Assessor upon the value of Appellant's interest in the lands, premises and property of the Appellant, returned by Appellant as of the value of $744,041.77 and assessed by the Assessor at $1,831,000, and the valuation placed thereon by the Tax Appeal Court being $1,360,000, from which decision by the Tax Appeal Court the Appellant having given notice of appeal to the Supreme Court and having filed a bond with surety in the sum of One Hundred Dollars ($100) to pay the cost of said appeal, I hereby certify up to the Supreme Court of the Territory of Hawaii the record of all the proceedings had before the Tax Appeal Court in and concerning such questions,
23 together with a copy of the evidence taken before said Tax Appeal Court and the decision of said Tax Appeal Court in said cause.

In witness whereof, I have set my hand this 26th day of July, A. D. 1906.

(Signed) THEO. LANSING,
Chairman, Tax Appeal Court, First Taxation Division, Territory of Hawaii.

[Endorsed:] S. C. No. 151. Registered Vol. 1, page 125. Filed July 26 '06. (Sg.) J. A. Thompson, Clerk.

24 Before the Tax Appeal Court of the First Judicial Circuit, Territory of Hawaii.

HONOLULU RAPID TRANSIT & LAND COMPANY, Appellant,
vs.
JAMES L. HOLT, Tax Assessor, First Division, Appellee.

Certificate of Appeal.

I, Theodore F. Lansing, Chairman of the Tax Appeal Court for the First Judicial Circuit of the Territory of Hawaii, do hereby certify that in the foregoing entitled appeal, to wit, the Honolulu

Rapid Transit & Land Company, a corporation, Appellant, *vs.* James Holt, Tax Assessor, First Division, Appellee, there was by the Appellee, filed in the above entitled Tax Appeal Court his notice of appeal from the decision of said Court of date the 25th day of July, A. D. 1906, which is hereunto annexed, endorsed, Appeal and notice of appeal. That heretofore, to wit, on the 25th day of July, A. D. 1906, the appellant in said cause did file with said Tax Appeal Court its appeal from the aforesaid decision of said Court in said cause, and I, as said chairman, on this 25th day of July, upon said appeal did certify up to the Supreme Court the record of all proceedings had before such Tax Appeal Court in and concerning said cause, including a copy of the evidence taken before such Tax Appeal Court and the decision of such Court in such cause.

25 The valuation of the property in dispute claimed by the Assessor is $1,831,060.00.

The valuation of the same claimed by the tax payer is $744,041.77.

The valuation placed thereon by the Tax Appeal Court was $1,360,000.00.

Honolulu, July 26, 1906.

(Signed) THEO. LANSING,
Chairman of the Tax Appeal Court, First Judicial Circuit.

[Endorsed:] S. C. No. 152. Registered Vol. 1, page 126. Filed July 26, 1906. (Sg.) J. A. Thompson, Clerk.

26 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

HONOLULU RAPID TRANSIT & LAND COMPANY, Appellant,
vs.
JAMES L. HOLT, Assessor, Appellee.

Re Assessment of Property Tax.

Statement of the Facts of the Case.

The foregoing cause was heard in this Court upon the following facts, found by the Court and certified to the Supreme Court of the United States on the appeal herein taken, which facts are as follows:

The appellant made the statement dated January 31, 1906, marked "S. C. No. 151, registered Vol. 1, page 125, filed August 3, 1906, (Signed) J. A. Thompson, Clerk," a copy of which, with the endorsements thereon appears in the record.

Thereafter, on March 31, 1906, the Assessor gave a notice of change of assessment upon two papers, which are included in the record and marked respectively "S. C. No. 151, registered Vol. 1 page 126, filed July 26, 1906, (Signed) J. A. Thompson, Clerk," and "S. C. No. 151, registered Vol. 1 page 125, filed July 26, 1906, (Signed) J. A. Thompson, Clerk."

That thereafter the said Assessor made the assessment of said property of the appellant found in the Exhibit marked "S. C.
27 No. 151, registered Vol. 1 page 125, filed June 26, 1906, (Signed) J. A. Thompson, Clerk."

That upon the 26th day of July, 1906, the appellant gave the Notice of Appeal to the Tax Appeal Court for the First Taxation Division, Territory of Hawaii, found in the record marked "S. C. No. 151 registered Vol. 1 page 125, Filed July 26, 1906, (Signed) J. A. Thompson, Clerk;" and the Assessor gave the Certificate of Appeal on the 12th day of May, 1906, marked "S. C. No. 151, registered Vol. 1 page 125, filed July 26, 1906, (Signed) J. A. Thompson, Clerk."

That thereafter the said Tax Appeal Court rendered the decision found in the record dated July 24, 1906, and marked "S. C. No. 151, registered Vol. 1 page 125, filed July 26, 1906, (Signed) J. A. Thompson, Clerk"; from which decision the appellant duly appealed to this Court on the 25th day of July, 1906, by a Notice of Appeal found in the record marked "S. C. No. 151, registered Vol. 1, page 125, filed July 26, 1906, (Signed) J. A. Thompson, Clerk"; and the Chairman of the Tax Appeal Court, on the 26th day of July, 1906, gave the Certificate of Appeal to this Court found in the record and marked "S. C. No. 151, registered Vol. 1 page 125, filed July 26, 1906, (Signed) J. A. Thompson, Clerk"; and on the 26th day of July, 1906, the said James L. Holt also appealed to this Court by notice of that date found in the record marked "S. C. No. 152 registered Vol. 1, page 126, filed July 26, 1906, (Signed) J. A. Thompson, Clerk"; and the said Chairman of the Tax Appeal Court gave a further Certificate of Appeal dated July 26, 1906, found in the record marked "S. C. No. 152, registered Vol. 1 page 126, filed July 26, 1906, (Signed) J. A. Thompson, Clerk."

Upon the 12th., 16th. and 17th days of October, 1906, the above entitled cause, was argued before this Court and upon the 17th day of October, 1906, this Court rendered the opinion found in
28 the record marked "Filed October 29, 1906, (Signed) J. A. Thompson" and upon the hearing of said argument of this cause found the facts set out in said opinion, which opinion and findings are referred to and made a part hereof, and upon the 21st day of November, 1906, this Court entered the judgment found in the record marked "Filed November 21, 1906, at 10 A. M. (Signed) J. A. Thompson, Clerk."

The foregoing Statement of the facts of the case being found correct and conformable to the truth is hereby allowed.

Dated Honolulu, H. T. This 4th day of February, 1907.

By the Court:

(S'g) J. A. THOMPSON,
Clerk Supreme Court.

Endorsed: Presented this 27th day of December, 1906 at 10.50 A. M. (Sg) J. A. Thompson, Clerk. Filed February 4, 1907, at 2.10 P. M. (Sg.) J. A. Thompson, Clerk.

29 In the Supreme Court of the Territory of Hawaii.

October Term, 1906.

In re Assessment of Income Taxes, HONOLULU RAPID TRANSIT AND LAND COMPANY.

Appeal from Tax Appeal Court, Oahu.

In re Assessment of Property Taxes, HONOLULU RAPID TRANSIT AND LAND COMPANY.

Cross-Appeals from Tax Appeal Court, Oahu.

Argued Oct. 12, 16, 17, 1906, decided Oct. 17, 1906.

Frear, C. J., Hartwell, and Wilder, JJ.

Income Taxes—Depreciation of Property not Deductible.—In estimating the amount of taxable net income depreciation of property due to climate and wear and tear is not deductible under the head of losses actually sustained or incurred. Expenses for repairs or replacements when actually made may be deductible under the head of necessary expenses actually incurred.

Id.—Sinking Fund not Deductible.—In estimating the net income of the corporation in question for the purposes of taxation, there cannot be deducted the amount which the corporation is permitted by its franchise act to set aside as a sinking fund (besides operating expenses and an 8% dividend) before dividing equally with the Territory the balance of the income.

Property Taxes—"Capital Issues" Do Not Include Bonds.—"Capital Issues" do not include bonds, in a statutory provision that the combined property of every corporation holding a public utility franchise other than such as are required to pay the Territory a percentage of its gross income shall be assessed at not less than the total amount of the "par value of the capital issues emitted" by it.

Id.—Franchise Taxable.—The franchise of the corporation in question is not excluded or exempt from taxation by the Territory either under the provisions of the franchise act or as being a federal franchise.

Tax Appeal—Powers of This Court Not Restricted by Action
30 of Tax Court.—This court may assess the property of a corporation as combined property even if the tax appeal court assessed it as separate items. The appeal is general.

Oral Opinion.

The first of these cases relates to the income taxes for the latter half of the year 1905 of the Honolulu Rapid Transit and Land Company, which conducts an electric street railway in Honolulu and whose franchise expires in 1928. The company returned its gross income for the half year at $169,295.82 and deductions at $180,822.67 leaving no net income for taxation. Among the deductions was an item of $40,925.43 under the head of "losses otherwise actually incurred" as having been written off at the end of the year for depreciation of property during the entire year due to climatic and other conditions of wear and tear and not included in "necessary expenses actually incurred" in carrying on the business or for repairs, etc. The assessor disallowed this item, thereby leaving a net income of $29,409.58 for taxation, and the company appealed. Since this item was for depreciation during the entire year and since half of it if allowed for the half year in question would still leave a net income the company endeavored to show before the tax appeal court that the actual depreciation for the year amounted to $57,827, which was the aggregate of various percentages estimated as depreciation on different portions of the property. It contended also that it was entitled to deduct $45,510.68 as "sinking fund," although it had not actually set aside that as sinking fund or claimed any such deduction in its return. This contention was based on section 17 of its franchise act (Rev. Laws, Sec. 851), which provides that the company may charge upon its income (1) operating expenses, etc., (2) dividends not exceeding 8 per cent., (3) *a sinking fund* for the redemption of bonds or other record debt and the capital upon the expiration of the franchise, (4) the excess of income to be divided equally between the Territory and the stockholders, (5) a quarterly account to be
31 rendered by the corporation. The contention was that it would be a violation of the franchise not to allow a deduction for a sinking fund for the purposes of taxation. The tax appeal court sustained the assessor and the company appealed to this court.

The second of these cases relates to the property taxes of the same company assessable as of January 1, 1906. The company returned its property as separate items aggregating in value $752,972.58, less an exemption amounting to $8,930.81, leaving a net valuation of $744,041.77 for taxation. It made no return of its property as a whole valued as property combined and made the basis of an enterprise for profit. The assessor added new items not returned and increased the values of certain items returned separately, the only change of much consequence being the addition of an item of $500,000 for the franchise of the corporation, and then assessed the entire property as a whole at $1,831,000, which was the amount of the company's stock and bonds less $9,000 exemption. He contended that he was required to do this by section 1216 of the Revised Laws as amended by Act 88 of the Laws of 1905, which provides that the combined property of a corporation of this class shall be assessed at not less than the total amount of the "par value of the capital

issues emitted" by it, the contention contra being that "capital issues" within the meaning of this statute does not include bonds and also that whether it includes bonds or not the statute is unconstitutional as placing an arbitrary valuation upon the property and making unreasonable discriminations. The tax appeal court held that capital issues did not include bonds and reduced the valuation below the assessment and the assessor appealed to this court. The tax court did not pass on the validity of the act, in case capital issues should be held to include stock, because it placed the valuation of the property at an amount greater than the capital stock of the company.

On the question of actual value, that is, aside from the provisions of the act just referred to, the assessor at the hearing before the tax court introduced evidence of new items and increased valua-
32 tions of old items, the result of which showed a total valuation of $1,458,000, and showed further that practically the same result would be reached by taking the aggregate of the stock and bonds less the exemption, namely, $350,000 of preferred stock at the market value of $101.50 per share, $800,000 of common stock at $65 less ten per cent., and the bonds, $690,000, at their par value, their market value being greater, and deducting the exemptions of about $9000, and referred to the decision of this court in 16 Haw. 802, rendered last year affirming an assessment of $1,351,015.95. The company contended, among other things, that the franchise was not taxable under the provisions of the franchise act, particularly section 17 above referred to, and section 30 (Rev. Laws, Sec. 865), which provides that the company's property shall not be liable to internal taxation while the railway is under construction provided that as fast as completed the completed portions shall become liable to such taxation; and also that the franchise was not taxable by the Territory for the reason that it was a federal franchise, inasmuch as the original franchise act, though enacted by the legislature of the Republic of Hawaii, was void because not approved by the president of Hawaii until the day, July 7, 1898, on which congress passed the joint resolution annexing these islands to the United States, and was validated only by the provision made by congress in section 73 of the organic act of the Territory ratifying, subject to the approval of the president, all dispositions of the public domain and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii between July 7, 1898, and September 28, 1899, and by the approval of the president in pursuance of that provision. The tax appeal court held that the franchise was taxable and fixed the several items of the company's property at such values as to aggregate $1,360,473.77, and found also that the value of the property taken as a whole would be not far from that amount and accordingly fixed the valuation at $1,360,000. The company appealed to this court for a reduction from this amount on the grounds urged
33 by it before the tax court, and contends further that the tax court, upon a proper construction of its decision, based its ultimate finding solely upon the valuations of the property regarded as separate items, and that this court cannot now base its decision upon the valuation of the property as a whole.

The foregoing statement of the case was prepared by the chief justice, who, at the close of the argument, the court not calling upon the assessor on the company's appeal in the second case, rendered the opinion of the court orally as follows:

FREAR, *C. J.*:

There are two cases before the court, one involving the income tax and the other the property tax of the Honolulu Rapid Transit and Land Co., there being cross appeals in the latter case.

In the first case two questions are raised. One is whether the company may write off a certain amount annually for depreciation in its property—in cases in which repairs cannot be made annually, as where certain portions of the property are used for a number of years before it completely wears out and requires replacing. In the opinion of this court this cannot be done. Such depreciation does not come under "losses actually sustained or otherwise actually incurred during the year," within the meaning of the statute on income taxes. If this loss may be deducted at all, it is when the repairs are made or the property replaced by substituting new property for it. It would then come within the provision of the statute allowing a deduction of "necessary expenses actually incurred," etc. This ruling is required by implication at least from the reasoning of the court in the *Hawaiian Commercial* case, 14 Haw. 601 and, on rehearing, 687, and by the case there cited from the United States Supreme Court, *Grant v. Hartford & N. H. Ry. Co.*, 93 U. S. 225.

The court is clearly of the opinion that the other point also is not well taken—that an amount may be deducted for a sinking fund. That provision of the statute—relating to a sinking fund—was inserted merely with a view to ascertaining in what income the
34 government should participate, not with a view to making the sinking fund a deductible amount for purposes of taxation any more than would be the case with any other company or corporation which might set aside a sinking fund as a good business proposition.

We now come to the second case, that involving the property tax, taking up first the appeal of the assessor. This, as we understand it, is based upon the statute enacted by the legislature of 1905, act 88, which provides that "the combined property of every corporation holding a public utility franchise and occupying the public streets or highways of the Territory, other than any such corporation that by the terms of its franchise is required to pay a percentage of its gross income to the Territory, shall be valued and assessed at not less than the total amount of the par value of the capital issues emitted by such corporation." The court is of the opinion that the phrase "capital issues" is of such ambiguity and uncertainty that it ought not to be held to include bonds issued by a corporation or other evidences of indebtedness. There is no doubt that statutes of this nature should be construed strictly. That has often been held by this court—there are a great many cases in the Hawaiian reports as well as elsewhere—and it is particularly applicable in a case like this in

which there is at least very grave doubt as to the constitutionality of the statute.

In view of this ruling and other rulings that we are about to make it will be unnecessary to go into the question of the constitutionality of the statute.

Coming to the appeal of the taxpayer, the main question is whether the franchise is taxable. We see nothing in the act itself which would exclude the franchise from taxation. The imposition of a property tax upon the combined property of the company, including the franchise, would not be inconsistent with the franchise itself or the provisions of sections 17 and 30 of the franchise act. The court is also of the opinion that this is not a federal franchise such as could not be taxed by the Territory. The franchise act was passed by the Republic of Hawaii, and congress, if its act (section 73 of the
35 organic act) touches this at all—we do not mean to question that—simply ratified what had already been done. Its ratification was nothing more in effect than a previous authorization would have been. There certainly could not have been an intention on the part of congress to grant a special franchise in the nature of other special franchises granted by it so as to take it out of the jurisdiction of the Territory of Hawaii for purposes of taxation.

So far as the actual value found by the tax appeal court is concerned, we see no reason to alter it. The amount is only slightly greater than was fixed by this court in a previous case, and the property, all things considered—the combined property—seems to be worth that amount from whatever standpoint we look at it. Certainly, considering the amount of the bonds and stock, the latter at a fair valuation, we would be justified in fixing that amount.

Mr. Justice Hartwell suggests that I may have implied that the court meant to hold that in the act of 1905 the phrase "capital issues" includes stock although we do not hold that it includes bonds. We, at least speaking for myself and for Mr. Justice Wilder, express no opinion upon that question.

HARTWELL, *J.*:

My own opinion is that the phrase appears absolutely insensible. It is the most elusive phraseology that I have ever tried to interpret. Some people seem to understand what it means, but I think that is because they know, but as I do not know what was intended by "capital issues emitted" there seems to me to be an absolute confusion of thought.

FREAR, *C. J.*:

There is a further point that I did not refer to. The case is before this court on general appeal and the court can make the assessment on the basis of an enterprise for profit.

M. F. Prosser, Deputy Attorney General, (E. C. Peters, Attorney General, on the briefs) for the Tax Assessor.

D. L. Withington (Castle & Withington on the briefs) for the taxpayer.

S. M. Ballou (Ballou & Marx on the brief-) also for the taxpayer in the second case.

By the Court:

(Sg.) J. A. THOMPSON, *Clerk.*

Filed October 29, 1906 at 10 A. M. by Order of Court.

(Sg.) J. A. THOMPSON.

36 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

In re Assessment Property Tax, HONOLULU RAPID TRANSIT & LAND CO.

Cross-appeal from Tax Appeal Court, Oahu.

Judgment.

Now, on this 17th day of October, 1906, the above cause having been duly argued and submitted to this Court, and a decision rendered herein and the same — been filed together with a statement of facts on the 29th day of October, 1906.

Now, therefore, it is ordered and adjudged by the Court that the decision of the said Tax Appeal Court for the Island of Oahu be and the same is hereby affirmed.

By the Court,

(Sg.) J. A. THOMPSON,
Clerk of the Supreme Court of
[SEAL.] *the Territory of Hawaii.*

Entered this 21st day of November, A. D. 1906.

37 [Endorsed:] No. —. Supreme Court, Territory of Hawaii. *In re* Assessment Property Tax *vs.* Honolulu Rapid Transit & Land Co. Filed November 21, 1906, at 10 A. M. (Sg.) J. A. Thompson, Clerk. Castle & Withington, attorneys for defendant.

38 In the Supreme Court of the United States.

HONOLULU RAPID TRANSIT AND LAND COMPANY, Appellant,
vs.
JAMES L. HOLT, Assessor, Appellee.

Re Assessment of Property Tax.

Bond on Appeal.

Know all men by these presents: That we, the Honolulu Rapid Transit and Land Company, George P. Castle and Charles H. Atherton, all of Honolulu in the County and Island of Oahu and Territory of Hawaii, are held and firmly bound unto the above named

James L. Holt, Assessor, in the sum of thirteen thousand dollars to be paid to the said James L. Holt, Assessor, his successors and representatives, for the payment of which well and truly to be made, we bind ourselves, and each of us, our, and each of our, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 30 day of November 1906.

Whereas, the above named appellant has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the Supreme Court of the Territory of Hawaii:

Now, therefore, the condition of this obligation is such that if the above named appellant shall prosecute said appeal to effect and answer all damages and costs, if it shall fail to make good said appeal, then this obligation shall be void. Otherwise to remain in full force and effect.

HONOLULU RAPID TRANSIT AND LAND COMPANY,

[SEAL.] By (Sg.) L. TENNEY PECK, *President.*
By (Sg.) CHAS. H. ATHERTON, *Treasurer.*
(Sg.) GEORGE P. CASTLE. [SEAL.]
(Sg.) CHAS. H. ATHERTON. [SEAL.]

Approved by:
(Sg.) W. F. FREAR.
Chief Justice of the Supreme Court of the Territory of Hawaii.

Honolulu, Dec. 1, 1906.

39 [Endorsed:] No. —. Supreme Court, Territory of Hawaii. Honolulu Rapid Transit and Land Company *vs.* James L. Holt, assessor. Bond on appeal. Filed Dec. 1st, 1906. (Sg.) Henry Smith, Clerk Supreme Court, Ter. of Hawaii. Castle & Withington, attorneys for appellant.

40 In the Supreme Court of the United States.

Re Assessment of Property Tax.

HONOLULU RAPID TRANSIT AND LAND COMPANY, Appellant,
vs.
JAMES L. HOLT, Assessor, Appellee.

On Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now comes the Honolulu Rapid Transit and Land Company, the appellant in the above entitled action and says that in the record of the proceedings in said action in the Supreme Court of the Territory of Hawaii, there is manifest error in this, to-wit:—

1. That it was error to hold that the franchise of the Honolulu Rapid Transit and Land Company is not excluded or exempt from taxation by the Territory of Hawaii under the provisions of the act granting the franchise.

2. That it was error to hold that the franchise of the Honolulu Rapid Transit and Land Company is not excluded and exempt from taxation by the Territory of Hawaii as a federal franchise.

3. That it was error to hold that "the imposition of a property tax upon the combined property of the company, including the franchise, would not be inconsistent with the franchise itself or the provisions of section- 17 and 30 of the franchise act."

4. That it was error to hold that "the Court is also of the
41 opinion that this is not a federal franchise such as could not be taxed by the Territory. The franchise act was passed by the Republic of Hawaii, and congress, if its act (section 73 of the organic act) touches this at all—we do not mean to question that—simply ratified what had already been done. Its ratification was nothing more in effect than a previous authorization would have been. There certainly could not have been an intention on the part of congress to grant a special franchise in the nature of other special franchises granted by it so as to take it out of the jurisdiction of the Territory of Hawaii for purposes of taxation."

5. That it was error to hold that the appellant could be taxed on any sum greater than the amount of the assessment on the individual items specified in a notice to appellant of a raise on its assessment.

6. That there was error in assessing appellant on any sum above $750,512.77.

Wherefore, the said appellant, the Honolulu Rapid Transit and Land Company, prays that the order and judgment of the Supreme Court of the Territory of Hawaii entered in the above entitled matter on the 21st day of November, 1906, affirming the decision of the Tax Appeal Court and fixing the assessment of this appellant at One Million, Three Hundred and Sixty Thousand Dollars ($1,360,000.00), be reversed and that the Supreme Court of the Territory of Hawaii be ordered to fix the assessment of appellant as herein prayed for.

CASTLE & WITHINGTON,
(Sg.) W. R. CASTLE,
(Sg.) DAVID L. WITHINGTON,
Attorneys for Honolulu Rapid Transit and Land Co., Petitioner.

42 [Endorsed:] In the Supreme Court of the United States. Honolulu Rapid Transit & Land Company, appellant, *vs.* James L. Holt, assessor, appellee. Assignment of errors. Filed Dec. 1st, 1906. (Sg.) Henry Smith, clerk supreme court, Ter. of Hawaii. Castle & Withington, attorneys for appellant.

43 In the Supreme Court of the United States.

HONOLULU RAPID TRANSIT AND LAND COMPANY, Appellant,
vs.
JAMES L. HOLT, Assessor, Appellee.

Re Assessment of Property Tax.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To James L. Holt, assessor, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within sixty days from the date of this writ, pursuant to an appeal, filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii, in a case wherein the Honolulu Rapid Transit and Land Company is appellant, and you, the said James L. Holt, are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable Walter F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, this 1st day of December, in the year of our Lord one thousand nine hundred and six.

[Seal Supreme Court, Territory of Hawaii.]

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

44 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

HONOLULU RAPID TRANSIT AND LAND COMPANY, Appellant,
vs.
JAMES L. HOLT, Assessor, Appellee.

Re Assessment of Property Tax.

Appeal from Tax Appeal Court, Oahu, in re Assessment of Property Tax of Honolulu Rapid Transit and Land Company.

Appeal.

The above named appellant, Honolulu Rapid Transit and Land Company conceiving itself aggrieved by the order and judgment entered on the 21st day of November, 1906, in the above entitled proceeding does hereby appeal from the said order and judgment to the Supreme Court of the United States, and prays that this appeal may be allowed for the reasons specified in the Assignment of Errors herewith and that a transcript of the records, proceedings and papers, upon which said order and judgment was made, and a statement of the facts of the case, shall be made and certified by this Court and

transmitted to the Supreme Court of the United States, duly authenticated.

Dated at Honolulu, T. H., November 30, 1906.

CASTLE & WITHINGTON,
WM. R. CASTLE,
DAVID L. WITHINGTON,
Attorneys for Honolulu Rapid Transit and Land Co., Appellant.

45 And now, to-wit, on the 1st day of December, 1906, it is ordered that the appeal be allowed as prayed for.

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of the foregoing appeal and citation and receipt of a copy thereof, admitted this — day of November, 1906.

——— ———,
Deputy Attorney General, Attorney for James L. Holt, Appellee.

46 [Endorsed:] In the Supreme Court of the United States. Honolulu Rapid Transit & Land Company, appellent, *vs.* James L. Holt, assessor, appellee. Appeal and citation. Filed Dec. 1st, 1906. Henry Smith, Clerk Supreme Court, Ter. of Hawaii. Castle & Withington, attorneys for appellent.

Service of the within and foregoing appeal & citation and the receipt of a copy thereof admitted this 1st day of December, 1906.

E. C. PETERS,
Attorney General for the Territory of Hawaii and Attorney for the Appellee, James L. Holt, Assessor.

47 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

HONOLULU RAPID TRANSIT AND LAND COMPANY, Appellant,
vs.
JAMES L. HOLT, Assessor, Appellee.

Re Assessment of Property Tax.

Order Extending Time.

The time for filing the record in this cause in the Supreme Court of the United States, pursuant to the appeal sued out, is extended until the 28th day of February, 1907.

Dated, Honolulu, T. H. this 17th day of January, 1907.

[Seal Supreme Court, Territory of Hawaii.]

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

48 [Endorsed:] No. —. Supreme Court, Territory of Hawaii. Honolulu Rapid Transit and Land Company *vs.* James L. Holt, assessor. Order extending time. Filed January 17, 1907, at 9:55 a. m. J. A. Thompson, clerk. Castle & Withington, attorneys for appellant.

49 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

HONOLULU RAPID TRANSIT AND LAND COMPANY, Appellant,
vs.
JAMES L. HOLT, Assessor, Appellee.

Re Assessment of Property Tax.

UNITED STATES OF AMERICA,
Territory of Hawaii, ss:

I, Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing Appeal, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 48, inclusive, contain a true and complete transcript of the record and proceedings, including an assignment of errors and the original appeal and citation on appeal, in said Court in the cause of Honolulu Rapid Transit and Land Company, appellants, against James L. Holt, assessor, appellee, as the same remain of record and on file in my office as the Clerk of said Court.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed, at Honolulu in the Territory of Hawaii, this 4th day of February, 1907.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

Endorsed on cover: File No. 20,578. Territory of Hawaii supreme court. Term No. 235. Honolulu Rapid Transit and Land Company, appellant, *vs.* James L. Holt, assessor. Filed February 16, 1907. File No. 20,578.

Supreme Court of the United States

OCTOBER TERM, 1917.

HONOLULU RAPID TRANSIT AND LAND COMPANY,

Appellant,

vs.

JAMES L. HOLT, Assessor,

Appellee.

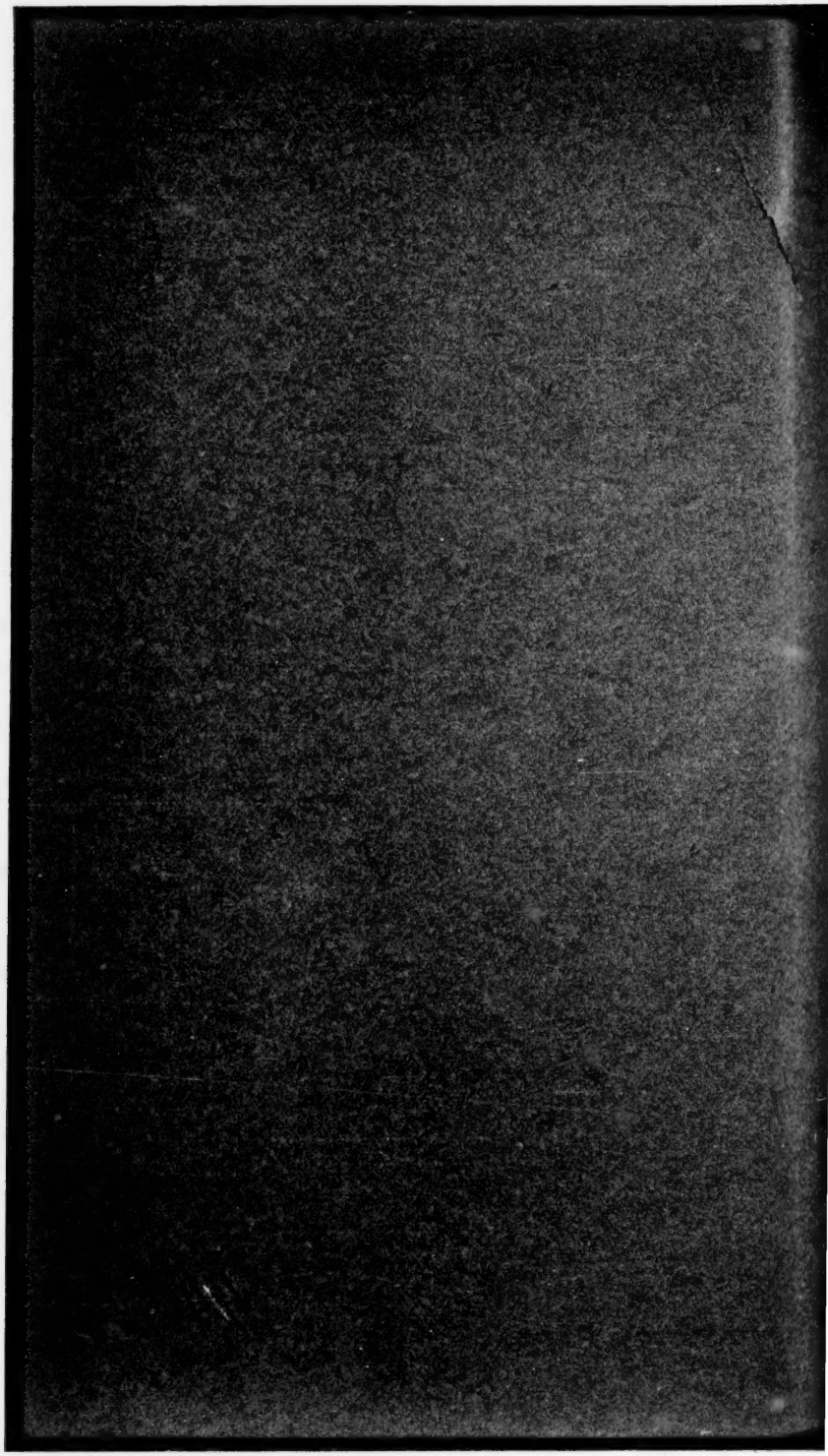
No. [illegible]

Appeal from [illegible]

Territory of Hawaii.

BRIEF FOR APPELLANT.

[illegible]



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Supreme Court of the United States.

OCTOBER TERM, 1907.

HONOLULU RAPID TRANSIT AND LAND COMPANY, Appellant, vs. JAMES L. HOLT, Assessor.	No. 235. Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF FOR APPELLANT.

STATEMENT.

This is an appeal from a judgment of the Supreme Court of the Territory of Hawaii rendered October 17, 1906, affirming a decision of the Tax Appeal Court for the Island of Oahu finding the taxable value of the property of the Honolulu Rapid Transit and Land Company to be $1,360,000.00, this decision being rendered July 24, 1906, upon the appeal of the Honolulu Rapid Transit and Land Company from an assessment made by James L. Holt, Tax Assessor, increasing the taxable value of its property from the sum of $744,041.77 as returned to the sum of $1,831,000, this increase having been made under the provisions of Sec. 1216 of the Revised Laws of Hawaii as amended by Chapter 88 of the Session Laws of 1905 providing for the assessment of a corporation holding a public utility franchise other than those paying a percentage of gross earnings, "at not less than the total amount of the par value of the capital

issues emitted by such corporation," from which decision of the Tax Appeal Court, both the Assessor and the tax-payer took an appeal to the Supreme Court.

The main questions in controversy were the constitutionality of the Act of 1905, upon which no decision was deemed necessary by either the Tax Appeal Court or the Supreme Court of the Territory of Hawaii; whether in capital issue any bond issue should be included, or whether only the capital stock of the appellant, viz., $1,150,000, was the minimum limit named in the Act, a construction adopted by both courts; and whether the franchise of the corporation, granted under the Act of the Republic of Hawaii, approved July 7, 1898, and approved by the President of the United States of America June 25, 1900, by virtue of the Organic Act of the Territory of Hawaii April 30, 1900 (31 Sts. at L. 141 c. 339), is taxable, the latter question arising under two claims: One, that it is a Federal franchise of a character not subject to taxation; the other, that by the terms of the charter the franchise is not taxable.

The material parts of the Act of July 7, 1898, the Organic Act, and those provisions of the Revised Laws of Hawaii of 1905 and of the Act of 1905 referred to, necessary for the consideration of the case, are printed in the appendix.

ERRORS ASSIGNED.

Six errors are assigned, but as 3, 4 and 6 are but specifications under 1, 2 and 5, we will consider them under three heads:

1. That it was error to hold that the franchise of the Honolulu Rapid Transit and Land Company is not excluded or exempt from taxation by the Territory of Hawaii under the provisions of the act granting the franchise, and therefore it was error to hold that "the imposition of a property tax upon the combined property of the company, including the franchise,

would not be inconsistent with the franchise itself or the provisions of Sections 17 and 30 of the franchise act."

2. That it was error to hold that the franchise of the Honolulu Rapid Transit and Land Company is not excluded and exempt from taxation by the Territory of Hawaii as a federal franchise, such as could not be taxed by the Territory.

3. That it was error to hold that the appellant could be taxed on any sum greater than the amount of the proposed assessment on the individual items specified in the notice to appellant of a raise on its assessment, and therefore there was error in assessing appellant on any sum above $751,182.77, to-wit: by adding $109,291 on track, roadbed and overhead structure, of which no notice was given, and $500,000 on the franchise.

ARGUMENT.

I.

THE FRANCHISE, RATIFIED BY CONGRESS AND APPROVED BY THE PRESIDENT, IS AN IRREVOCABLE CONTRACT, PROVIDES IN DEFINITE TERMS FOR THE DIVISION OF THE REVENUE OF THE COMPANY BETWEEN THE TERRITORY AND THE COMPANY, AND FIXES THE CHARGES DEDUCTIBLE FROM THE INCOME, WHICH CHARGES INCLUDE TAXES ON THE PHYSICAL PROPERTY BUT NOT ON THE FRANCHISE.

The Act of July 7, 1898, ratified by the Organic Act and the approval of the President of the United States, constitutes a contract between the Territory of Hawaii and the Honolulu Rapid Transit and Land Company, which is irrevocable and cannot be modified, excepting under the exercise of the police powers and as reserved in the instrument itself. By that act

it is provided what sums shall be a charge upon the income and how the income shall be divided between the company and the Territory of Hawaii, which is its partner in the enterprise.

The scheme of the act is based on the theory that the Territory is an interested party, having a reversionary interest in the franchise, and a present interest in its profits. For this reason, the location of the road is carefully guarded.

In Section 2 the consent of the Executive Council to right-of-way must be obtained in several instances in portions of the route set forth in the franchise, and with the consent of the majority of the property owners and the Executive Council, the right is given to lay upon any street.

In Section 3 the consent and approval of the Executive Council is required to the use of other motive power than electricity or compressed air.

By Section 4 the location in the streets is to be directed by the Minister of the Interior; the cars and their equipment are to be approved by the Executive Council; the style of rail is to be approved by the Minister of the Interior; guard wires are also to be approved by him, as well as the repairing of the streets, and all other matters and things required by the section.

By Section 9 the rate for transportation outside of certain limits is to be fixed, subject to the approval of the Executive Council; and by paragraph 4 of the same section the regulations for the maintenance and operation of the road are to be by the consent and approval of the Executive Council, while, if the road fails to make such rules and regulations, the Minister of the Interior with the approval of the Council may make them. The latter can also change such rules.

By Section 29 the rights and privileges are granted subject to such terms, conditions and restrictions as may be imposed by law in relation to constructing and maintaining street railways in the District of Honolulu; the tracks must conform to

the grade furnished by the Minister of the Interior, and any alteration must be with the written consent of the Executive Council; changes must be made to conform with the notice of the Minister of the Interior.

"Section 33. The entire plant, operation, books and accounts of the said association and others shall from time to time be subject to the inspection of the Minister of the Interior or other officer appointed by him for the purrpose."

By Section 9 it is provided:

"Policemen, firemen and letter carriers, when on duty, and in uniform, shall be entitled to free passage over any of the lines of said association and others."

"Section 35. The said association and others shall provide such receptacles upon their street cars as shall be approved by the Postmaster-General for the conveyance free of charge of all letters."

These are the provisions which subject the proposed company to the control, inspection and service of the Territory. By provisions of law to which we will hereafter refer, the portion of the revenue to be diverted to the benefit of the Territory is set forth. In return for this is given the right to lay, maintain and operate a railroad in the streets of Honolulu, and by Section 34 this right is to be transferred to a corporation with a capital stock of not less than two hundred thousand dollars, to whom the rights shall be assigned.

What the corporation is to get out of the franchise is defined by Sections 37 and 17. The former makes it lawful to increase the capital stock from the two hundred thousand dollars which is provided to an amount which will represent the actual cost of the property of the railway, and not over twenty-five per cent. of the cost in addition. While Section 17 is a complete scheme for the apportionment of the income to be derived from the operation of the road, declaring all charges to be made against it, and their order, the residue after these charges are

provided to be equally divided between the government and the corporation. The section declares then "the following charges shall be *lawful* upon the income of said railway:

"1st. The expense of operating, repairs, renewals, extensions, interest, and every other cost and charge properly or necessarily connected with the maintenance and operation of said railway."

"2nd. Dividends to be paid to the stockholders not to exceed eight per cent. on the par value of the stock issued."

"3rd. A sinking fund may be created for the redemption of any bond which may be issued or other record debt and the capital upon the expiration of the franchise. Provided, however, that the amount placed to the credit of such sinking fund annually, shall not exceed in amount, such a sum with interest computed at five per cent. per annum, compounded, as will principal and interest combined, at maturity, equal the par value of the bonds, record and capital debt aforesaid."

"4th. The excess of income shall be divided equally between the government of the Republic of Hawaii and the stockholders of said corporation."

"5th. A quarterly account or trial balance of the corporation shall be rendered by the corporation to the Minister of the Interior from the beginning of the actual construction of the railway."

Here is a complete scheme for the division between the Territory and the corporation, declaring what charges shall be lawful; and while it may be observed that taxes are not specifically mentioned, yet any "charge properly or necessarily connected with the maintenance and operation of said railway" is deductible.

It becomes necessary, then, to determine how far taxes are made a charge on the corporation. An examination of the act shows that two species of taxes are made a charge. License taxes at ten dollars per annum on each passenger car are provided by Section 31, and all other taxation is provided by Section 30, viz.:

"Section 30. All material required by the said association and others to be used for the purpose of this Act, when imported from the United States, and being the product or manufacture of the said United States shall be free of duty, and the property of the said association and others shall not be liable to internal taxation while said railway is under construction, provided that as fast as completed and equipped the completed and equipped portions shall become liable to such taxation."

By Section 1 the grantee named includes a corporation to be organized; and it further provides that;

"'Railway' shall refer to and mean the rails, tracks, roadway, with its appurtenances, appliances and connections to be placed in streets, roads or places on the Island of Oahu, as by this Act provided, or to such rails, tracks, roadway, etc., of any other corporation as may now be in existence or that may hereafter be laid."

As "Railway" is defined to be the physical structure and not an intangible right, the "completed and equipped portions * * * liable to taxation" are portions of the physical structure; so that the taxation to which the corporation becomes liable is a tax on the physical structure of the road, thus creating a charge on the income.

At the time of the enactment of the original Act by the Territory of Hawaii internal taxation included a poll-tax, a school tax, a road tax, cart and dray tax, a carriage tax, a dog tax, and a real and personal property tax; the latter tax being assessed under a general provision "separately as to each item thereof for its full cash value," substantially as set out in Section 1216 of the Revised Laws quoted in the appendix, with the exception of the second proviso, added by Chapter 88 of the Act of 1905.

Taxing the completed and equipped portions as fast as they are completed and equipped is consistent with the taxation of the real and personal property "separately as to each item for its full cash value;" it is inconsistent with the contention that

the aggregate value in operation as an enterprise for profit, which would include the franchise, can be so assessed. Nor can the franchise itself be assessed separately; it is not a part of the completed and equipped portion of the road, and although the word "franchise" is to be found in Section 1215, which describes the character of personal property to be taxed, it had long been held to be the policy of Hawaii to tax only tangible property.

McBryde v. Kala, 6 Haw. 529.
Brewer v. Luce, 6 Haw. 554.

Moreover, it would be double taxation and unconstitutional.

Kekaha Sugar Co. v. Hawaiian Government, 8 Haw. 293.

The franchise was one in which the right to share with the Territory was the only beneficial right which the corporation enjoyed. To tax it was open to three objections, long recognized in Hawaii:

(1) That where the property itself was taxed which comprised the enterprise, to tax the right to share is double taxation.

Kekaha Sugar Co. v. Hawaiian Government, ubi supra.
Alexander v. Fornander, 6 Haw. 322.
Haiku Sugar Co. v. Fornander, 6 Haw. 532.
Castle v. Luce, 4 Haw. 63.

(2) In the Kekaha Sugar Co. case already quoted, the clause authorizing the taxing of franchises and contracts was before the court, and while it was there held that "to tax every item of tangible property and then tax an engagement for the management or use of this property would under these circumstances be double taxation, which is unconstitutional," yet it was there said, *obiter,* that franchises are not tangible objects, but,

in so far as they have value, it may be that they are taxable; but this was said in view of the earlier decision of *Castle v. Luce,* where it was held that double taxation was not allowable and that to assess its real and personal property to a corporation and also its shares to its stockholders would be double taxation. It was, however, said:

"When an association of men get a valuable franchise, a new property is created, which would not be represented in any respect by the real or personal property belonging to the association or corporation, as for instance—a railroad corporation, which might have the right of laying rails through the streets of a town, would have a property in the franchise, which would not be represented by the value of their rails, rolling stock and animals. An aqueduct company which might have the right of breaking up the streets for the purpose of laying down their pipes and condemning lands for the purpose of getting their water supplies, has a similar property, which is not included in the real property which the corporation owns, or in the personal property which is visible and tangible. A ferry, or a gas company, and a bank having the authority to issue notes to pass as money, are instances in point."

Castle v. Luce, 4 Haw. 63, p. 72.

But it seems to us clear, in view of these decisions, which enter into the law of the land and into the contract, that neither the Republic nor the grantees named in the act contemplated taxation upon the new right created, for in terms they provided for taxation on the tangible property, viz.: what was put in, and not the new right.

Again, there is provided for the payment to the Territory, as a consideration for the franchise, one-half of the receipts after the capital invested, twenty-five per cent. of this amount and eight per cent. interest, have been returned, but the tax would fall wholly upon the stockholders of the corporation if the eight per cent. was not earned. The theory of the act is that it would be earned, and therefore such a tax would reduce that which was contemplated.

Again, these decisions show that Section 1216 of the Revised Laws clearly points two methods of taxation: One, the taxation of the tangible property; the other, its taxation in use. The act, which constitutes a contract, lays down a rule of taxation which elects to tax by the tangible method; and, having so elected, the contract further provides how the income shall be divided between the parties, hence the only charge for taxes permissible is the charge which the Republic had elected to make, viz., by the method of taxing tangible property.

Again, it is unreasonable to suppose, since under the law franchises were taxable, and an enterprise could be taxed either as a going concern or as tangible property, that the Legislature could have overlooked this in framing the contract, particularly in view of the fact that the public had an interest in the franchise, measured by its value and retained by the contract itself.

(3) The exercise of the proposed power of taxation would be violative of the spirit if not the letter of the constitution, in that it is an attempt, by the exercise of the power of taxation, to change the terms of a contract unambiguous in itself.

The Republic of Hawaii said to these gentlemen: If you will put in a transportation service, made subject, in construction, equipment and operation, to our approval and inspection, submit all your accounts quarterly to us, you shall receive in return for this what you have put in, twenty-five per cent. more and eight per cent. interest. You may also divide with us the excess. License taxes shall not be exacted above a fixed amount. Your property shall be exempt until it is used in actual construction, and then it shall be subject to internal taxation on the completed and equipped portions of the road. It would be subversive of the contract to allow it to be destroyed by the exercise of the power of taxation, which, so far as the franchise is concerned, would be unlimited.

It was long ago held by this court that where a price has been paid or agreed to be paid for a franchise, this becomes a fixed consideration for the granting of the franchise, which cannot be changed by the Legislature alone.

"A round sum, or an annual charge, with or without reference to capital stock, may be asked by a Legislature for such a franchise. It may be more convenient to the banks to have such a consideration or bonus distributed through the years of their corporate existence, than to pay its equivalent in advance. This option was given to the old banks. Being so given, it is conclusive that the Legislature intended the annual tax or charge upon the capital stocks of the banks to be the bonus or price, or part of the price as to some of them, that they were to pay for the prolongation of their franchise of banking. When the banks accepted the acts, by choosing to pay the annual charge instead of the stipulated alternative, it is plain that they thought so too, and that they understood in that way the contract between themselves and the State. Either was a condition, to be accepted and complied with before the charters were to be extended. Such a contract is a limitation upon the taxing power of the Legislature making it, and upon succeeding Legislatures, to impose any further tax upon the franchise. But why, when bought, as it becomes property, may it not be taxed, as land is taxed which has been bought from the State, was repeatedly asked in the course of the argument. The reason is, that every one buys land, subject in his own apprehension to the great law of necessity, that we must contribute from it and all of our property something to maintain the State. But a franchise for banking, when bought, the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price."

Gordon v. The Appeal Tax Court, 3 How. 132, p. 145.

And while this language is said to have been qualified and limited in subsequent decisions, it stands unreversed and approved on the proposition that, while the exemption from taxation must be plainly and unmistakably granted, since in grants from the public nothing passes by implication, the exemption need not be in any particular words, is not implied but is expressed if, from all the language of the grant, there is

no doubt of the contract; and this is clearly shown by the cases cited in the New York franchise cases (*New York v. State Board of Tax Commissioners*, 199 U. S. 1) and by Mr. Justice Gray in the case there cited as qualifying and limiting *Gordon v. The Appeal Tax Court*. Certainly it was not "qualified or limited," or "explained or disapproved," in *Piqua Branch of the State Bank v. Knoop*, 16 How. 369, where its language is expressly repeated and reaffirmed, and the contract in that case held to be "not a law prescribing the rule of taxation, but a contract fixing the amount of taxation," which cannot be changed; nor by *People of the State of New York v. Com'rs. of Taxes*, 4 Wall. 244, where the court held that there was no conflict between the case at bar and *Gordon v. The Appeal Tax Court* and that in the latter case, under "a true construction of the act, the stockholders were within the scope of the exemption; nor in *Jefferson Branch Bank v. Skelly*, 1 Black 436, where the rule of *Gordon v. The Appeal Tax Court* was sustained, but the rule is further laid down that the grant should be in clear and explicit terms; certainly not in *Farrington v. Tennessee*, 95 U. S. 679, the case next cited, where after enumerating the franchise as one of the objects liable to taxation and citing *McCulloch v. Maryland*, 4 Wheat. 316, to the point that "unrestrained power to tax is power to destroy," the court explicitly reaffirmed *Gordon v. The Appeal Tax Court* as conclusive of the case, saying:

"Under such a contract between individuals, a doubt could not have existed. It may as well be said the power is reserved to tax anything else, as further to tax the shares. We cannot so hold, without interpolating into the clause a term which it does not contain. This we may not do. Our duty is to enforce the contract as we find it, and not to make a new one. If it was intended to make the exception claimed from the universality of the exemption as expressed, it would have been easy to say so, and it is fairly to be presumed this would have been done. In the absence of this expression, we can find no evidence of such an intent."

Farrington v. Tennessee, ubi supra.

Nor in *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, where the Gordon case is followed, without limitation; but it is held that a provision authorizing the corporation to fix rates is nothing more than would be implied from the whole charter, viz., to fix the rates, subject to legislative control, as a necessary inference from the contract made. Nor in *Memphis Gas Light Co. v. Taxing District*, 109 U. S. 398, where the court does not refer to the Gordon case, but simply holds that no contract whatever was made.

The language of Mr. Justice Gray in *New Orleans & Lake R. Co. v. New Orleans*, 143 U. S. 192, cited by Mr. Justice Brewer, can therefore have no application to the authority of *Gordon v. The Appeal Tax Court*, so far as it decides that the contract is to be construed as any other contract and that if, as between the corporation and the Territory, the whole contract excludes the idea of a reserve power to destroy, (for "the taxation of a corporate franchise is the exercise of arbitrary authority, limited only by the discretion of the taxing power." *California v. Central Pacific R. R.*, 127 U. S. 1.) The reservation of such a right will not be implied when it is inconsistent with the whole contract as expressed and as it would be understood in the case of ordinary contracts between individuals.

It has been frequently held by this court that in cases where it was sought to tax one party to the contract who was a non-resident by providing that the other party, who was a resident, should retain something on account of the contract to pay taxes, this was beyond the power of the taxing authority; a law which interfered with the contract between the parties.

New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628.

State Tax on Foreign-Held Bonds, 15 Wall. 300.

In the latter case it was said:

"A law which alters the term of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract."

This reasoning is applicable to a contract made by the state, where the obligations are clearly fixed and where a change in the mode of taxation or the introduction of a new element of taxation would alter its terms by imposing new conditions.

It should be remembered, in the consideration of this case, that it is before this court on direct appeal and not by virtue of any conflict between the construction put by the court of Hawaii on the contract, with the provisions of the Constitution. We are entitled not only to the Constitutional guarantee, but to the spirit of the Constitution, in the construction of a franchise approved by Congress, and we need no better presentation than the discussion by Mr. Justice Brewer in the New York Street Railway franchise cases, where the court held that the granting of franchises to construct, operate and maintain street railways, in consideration of the payment of a gross sum or of the annual payment of a fixed amount or fixed percentage of earnings, does not constitute a contract to exempt from taxation from a franchise tax violative of the Constitution of the United States, and that the payment of a license fee on each street car does not exempt the company from a tax on its franchise.

New York v. State Board of Tax Commissioners, 199 U. S. 1.

New York v. State Board of Tax Commissioners, 199 U. S. 48.

For in none of these cases was there any contract for the division of the income between the State and the corporators,

nor any other provision governing what charges might be made for taxation. Nor did the imposition of taxation on the franchise not included in the provisions for taxation in the charter affect the amount to be received by the State out of the earnings, the proportion being a percentage upon the gross earnings; whereas in the case at bar the taxation of the franchise introduces a new charge, which is not "lawful upon the income of said railway," and not contemplated in the contract. The State has here entered into a contract for the division of the income, providing in detail every item which shall be charged to it and the order of precedence of charge, and among these charges has specified taxation and chosen two particular forms. No implication of exemption is required. The words of the contract are ample. The implication necessary to be made is that further charges upon the income could be made, or that a different mode of taxation could be adopted, as a result of which the franchise would become less valuable and a larger return would be received by one party and a less by the other.

Mr. Justice McKenna, in delivering the opinion of this court in a case where a license tax had been imposed on a bank, whose charter provided that "the capital of said bank shall be exempt from any tax," was held to be within the exemption, said:

"Capital was necessary. Private persons were to be induced to subscribe, and the state aided by an issue and pledge of its bonds. It was careful to make provision for control. No act of administration could be undertaken without its consent. It was represented by six members on a board of twelve directors. It, besides, contemplated the probability of profits, and made provision to share them. The scheme was large and hazardous. Private capital had to be tempted to it, and the state, besides contributing its credit, offered the inducement of a relief from burdens. There is no doubt of this, and the dispute is only as to the degree, and, on an ambiguity which may be asserted upon a distinction in the form of taxation, a limitation is attempted to be put upon the comprehensive and expressive words of the bank's charter. This seems to us not justified."

Citizens' Bank v. Parker, 192 U. S. 73.

The line of distinction between those cases in this court which have sustained the tax and those denying the right is to be found by determining the question whether there is a contract between the parties fixing their pecuniary rights, which the imposition of the tax would alter. In every such case it is necessary that the reservation of the power to alter by taxation should be expressed; for that surrender is expressed by a contract, with the terms of which the particular form of taxation is inconsistent.

The power to tax involves the power to destroy the entire contract. The provision of the charter fixing definitely what the Territory was to receive and what charges could be made upon the income before its receipt is, as was said in *Gordon v. The Appeal Tax Court*, "the language of grave deliberation, pledging the faith of the State for some purpose—some effectual purpose," and when there is provided in the act exactly what taxation should be a charge, it would be a breach of the faith of the State and a change of the clear terms of the contract to add to the charge. It is quite true that an exemption from taxation will not be implied; but in this case it is not the exemption of tangible property of the corporation that is sought, but that the State, in its sovereign right, should not, where it has granted a franchise on definite terms, under which it receives a fixed return and upon which it fixes the charges, add another and further condition which it can vary at its own pleasure.

It has been said by this court more than once that the power of amendment of charters may be exercised where it will not defeat or substantially impair the object of the grant or any rights which have vested under it.

Holyoke Water-Power Co. v. Lyman, 15 Wall. 500.

Fairhaven & W. R. Co. v. New Haven, 203 U. S. 379.

But, as was said in the latter case, quoting from *Shields v. Ohio*, 95 U. S. 319, "the alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the Act of incorporation." This is recognized in the Los Angeles Water cases.

Los Angeles v. Los Angeles City Water Co., 177 U. S. 558.

Los Angeles v. Los Angeles City Water Co., 124 Cal. 368.

Los Angeles v. Los Angeles City Water Co., 61 Cal. 65.

The latter case relies on the case of *Stein v. Mayor of Mobile*, 49 Ala. 362, which lays down the rule that where corporate authorities had leased and transferred water works for a fixed consideration the city could not "impose upon the lessee the obligation of paying a license or tax, for the privilege of carrying on the business"; and held that "the ordinance which attempts this impairs the grant and is void." As the court said, "if this right could be interfered with at all—as there is no limit to the interference—it may be defeated altogether. The contract shows that this was not the purpose of the parties. * * * The ordinance which assails the privilege already granted impairs the contract on which it depends, and is void; and the tax levied under its authority, by way of license, can not be supported."

II.

THE FRANCHISE OF THE COMPANY GRANTED BY THE REPUBLIC OF HAWAII JULY 7, 1898, RATIFIED BY CONGRESS AND APPROVED BY THE PRESIDENT, IS NOT ASSESSABLE.

What is assessed is clearly not the intangible element arising from use of the tangible part, but the right to use the streets

of Honolulu in a manner different from that of the use of others; the right to lay the track, the right-of-way in the streets, the right to demand payment for the use of the facilities furnished. This right was originally from the Republic of Hawaii; but on the day on which it was enacted, Congress also passed the resolution of annexation of Hawaii, and the status of the company became uncertain. When the Organic Act was passed providing a government for Hawaii, Congress declared that, "subject to the approval of the President, * * * all franchises granted by the Hawaiian Government in conformity with the laws of Hawaii, between the 7th day of July, 1898, and the 28th day of September, 1899, are hereby ratified and confirmed."

Organic Act of Hawaii, Sec. 73.

This provision, as a matter of history, was inserted because of the doubt cast upon the franchise by the declaration of the Executive Department of the United States that the Hawaiian Government had no right to grant the franchise in question. Congress, to solve this doubt and meet the objection, made the grant contained in Section 73, which removed any question of validity and made the franchise a Federal one, insusceptible of change by local Legislature except as therein expressly reserved.

Whether or not, without Congressional action, the franchise granted by the Republic of Hawaii on the very day of the passage of the resolution of annexation would have been perfect if accepted by the grantees; until accepted, Congress had the power to take away that right, and the approval by Congress and its ratification in the Organic Act is a part of the contract between the parties.

"Generalized, and devested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power, of public concern, which ought not to be exercised by private individuals at

their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority."

California v. Central Pacific R. R. Co., 127 U. S. 1.

And so it was held in the case last cited that the franchise in the Central Pacific Railroad Company, although the company was constituted by the consolidation of two state corporations of California, yet, as it derived many of its franchises and privileges from Congress, a tax upon that franchise without the permission of Congress rendered the assessment void; relying on *McCulloch v. Maryland, supra,* that the power to tax involves the power to destroy and "to tax it is not only derogatory to the dignity, but subversive of the powers, of the government, and repugnant to its paramount authority."

Reinforcing this is the fact that the power is arbitrary in its character, and has no limitation but the discretion of the taxing power. Therefore, unless this court shall hold that the taxing power is controlled and regulated by the provisions we have already cited, a federal franchise granted by Congress, having federal duties to perform in the carriage of mail and the transportation of public officers, would be subject to be destroyed by a legislative body, the creature of Congress.

The principal involved has been long recognized by this court, and the distinction made in the act granting this franchise by laying down a rule of taxation and confining it to the tangible property, which rule this court approved when it upheld the right and power of the state to levy property tax on a corpora-

tion holding a federal franchise, but denied the power to subject its operations to taxation.

Thomson v. Union Pacific Railroad, 9 Wall. 579.

Union Pacific R. R. Co. v. Peniston, 18 Wall. 5.

And it has been held that where there are two franchises, a state may tax its own franchise but not that of the United States.

Central Pacific R. Co. v. California, 162 U. S. 91.

Southern Pacific Railway Co. v. California, 162 U. S. 167.

A similar line of decisions has been followed in reference to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866.

Western Union Tel. Co. v. Attorney General, 125 U. S. 530.

Attorney General v. Western Union Tel. Co., 141 U. S. 40.

Western Union Tel. Co. v. Missouri, 190 U. S. 412.

Ratterman v. Western Union Tel. Co., 127 U. S. 411.

Leloup v. Port of Mobile, 127 U. S. 640.

The first case holding that the operation of the business, however, cannot be prevented.

These cases rest upon the proposition that the states have a right, although they may call it a franchise tax, to assess the property within their jurisdiction; but a direct tax upon the franchise is not allowable.

San Francisco v. Western Union Tel. Co., 96 Cal. 140.

The joint resolution adopted by Congress July 7, 1898 (30 St. L. 750), known as the Newlands Resolution, annexing the Hawaiian Islands "as a part of the Territory of the United States and subject to the sovereign dominion thereof," contained the following conditions:

"The municipal legislation of the Hawaiian Islands, not enacted for the fulfilment of the treaties so extinguished, and not inconsistent with this joint resolution *nor contrary to the Constitution of the United States,* nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

Assuming that the Act of the same date of the Republic of Hawaii granting a special franchise is not inconsistent with the resolution, it was in effect inconsistent with the policy of the United States in regard to territories.

Revised Statutes, Sec. 1889, amended by Act of July 30, 1886, Ch. 818, Sec. 5, 24 Stat. L. 171.

Organic Act of Hawaii, Secs. 55 and 73.

Which clearly show the policy of Congress not to grant private charters; and, in any event, such legislation was only to remain in force until the Congress of the United States should otherwise determine. It "otherwise determined" that this specific legislation should not remain in force unless approved by the President, and when so approved, until repealed by Congress, if such repeal be in its power after it had been accepted by the corporation, when approved by Congress it becomes a binding contract between the United States and the grantees of the franchise. It has been said by this court that the terms of this resolution make it evident that it was intended to be merely temporary and provisional, and that the existing legislation was only continued until changed by Congress.

Hawaii v. Mankichi, 190 U. S. 197.

Therefore, whether the Legislature of Hawaii had or had not the right during the period of interim, if this grant be within that period, to charge the sovereignty, which was in process of transfer, with this additional servitude, the resolution, followed by the Organic Act, shows the retention of the power in Congress and the exercise of the power to give life and virtue to the purported act of the Republic of Hawaii.

III.

THERE IS NO JURISDICTION IN THE TAX APPEAL COURT TO ADD AN INCREASE ON THE TRACK, ROADBED AND OVERHEAD STRUCTURE, OF $109,291.

Section 1243 provides, as a condition, that in case of any raise in the valuation of any property above the value stated in the assessment rate, a written or printed notice shall be given "describing the property the valuation of which has been so raised, and stating the proposed assessment thereof." In the case at bar the notice (Tr. p. 10, folio 9) is that "certain items in your Property Tax return have not been accepted by the Assessor, the same being changed as below;" and the tax-payer is further notified of the right to appeal by filing notice. Two columns are given: one of the valuation as returned; another as changed by the assessor. These changes, about which there is no conflict, would leave the assessment at $751,512.77, exclusive of the items, contracts, franchise and patents marked as changed by the assessor $500,000. Now, if the franchise is not taxable separately as we have shown, then the total amount cannot exceed $751,512.77. If the franchise can be taxed or included, then the amount cannot exceed $1,251,512.77, because the aggregate value of the combined real and personal property cannot exceed the value of the items, together with the value imparted to them by use. The stock and bond value, of which evidence was given, is only one of several ways of arriving at the value of the aggregate; it is not decisive, and where the assessor has assessed the intangible element, viz., the franchise, at a specified sum, he cannot make the aggregate greater than the sum of the tangible and intangible items. The tangible property is merely increased in value by the tangible factors.

Inter-Island Steam Nav. Co. v. Shaw, 10 Haw. 624.

Assessor v. Brewer, 15 Haw. 29.

In the latter case, the dissenting opinion, as well as the majority opinion, agrees that the statute simply adds the intangible to the tangible assessment.

Clearly the Tax Appeal Court had no right to add over a hundred thousand dollars to items of which no notice was given.

Georgia R. & B. Co. v. Wright, 207 U. S. 127.

Moore v. Boston, 134 Mass. 431.

Gibbons v. Adamson, 44 Kas. 203.

Co-operative Building & Loan Ass'n. v. State, 156 Ind. 463.

State v. Covington, 35 S. C. 245; 14 S. E. 499.

Powder River Cattle Co. v. Custer (Mont.), 45 Fed. 323.

Weyse v. Crawford, 85 Cal. 196.

The Tax Appeal Court is not a revising board in the ordinary sense, but is a board of appeal—a court, in other words—and the Constitution gives the tax-payer a right to notice and his day in court before the proceeding becomes final. In the statute no other notice is provided for other than that provided in Section 1243. This must be the notice which the Constitution guarantees.

"It has constantly been held that where a property owner so makes out and delivers to the assessor a list of his taxable property, with the valuation thereof, and the schedule and valuation are accepted by the assessor as correct, they cannot afterwards be altered or changed without first giving notice to the party assessed. *Cleghorn v. Postelwaite,* 43 Ill. 428; *McConkey v. Smith,* 73 Ill. 313; *Bank v. Cook,* 77 Ill. 622; *Camp v. Simpson,* 118 Ill. 224, 8 N. E. 308; *Huling v. Ehrich,* 183 Ill. 315, 55 N. E. 636; *Ayers v. Widmayer,* 188 Ill. 121, 58 N. E. 956. There can be nothing in the nature of a reassessment without notice to the party affected. There is some argument about changes in the statute at different times, but the rule would be the same under any statute. Every property owner

has a right to a hearing in such a case, and an assessor can not secretly reassess such owner without giving him an opportunity to contest the justice of the change. Cooley, Tax'n. 266; Desty, Tax'n., 596. That rule is founded on the plainest principles of justice, and is enforced by the guaranties of the constitution."

Tollman v. Salomon, 191 Ill. 202; 60 N. E. 809.

The notice provided in Section 1243 must describe the property the valuation of which has been so raised, and stating the proposed assessment thereof. This is not met by the invalid assessment sought to be made under an erroneous construction of the Act of 1905 authorizing the assessment at a minimum rate not less than the total amount of the capital issues. There has been no notice; for the notice itself shows that the assessor did not intend or claim that the values put upon the items raised by the Tax Appeal Board, for the track and overhead structure, which is contained in Schedule "E" on the notice, were objected to. He carefully changed the valuation on various items, but not these, and then made an assessment "under the provision of Section 1216 of Revised Laws of Hawaii, as amended by Session Laws of 1905," of $1,831,000, claiming it to be the total amount of the par value of the capital issues (Tr. p. 13, folio 13). The tax-payer here had no notice of an intention to raise the items raised by the Tax Appeal Board.

"It would be a dangerous precedent to hold that any absolute power resides in them to tax as they may choose, without giving any notice to the owner. It is a power liable to great abuse."

And Judge Cooley adds: It is a power that is certain to be abused.

Cooley on Taxation, 3rd Edit. p. 628.

Field J. Santa Clara v. Southern Pacific R. R. Co., 18 Fed. 385.

Undoubtedly, where notice of a decision, with the right to

appeal therefrom, is given before the valuation is finally fixed, this is sufficient notice.

Pittsburg C. C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 32.

But it is not due notice where one raise is specified in the notice and another and different one made by the court.

IV.

THE ACT OF 1905, FIXING A MINIMUM OF TAXATION AT THE AMOUNT OF CAPITAL ISSUES, IF BEFORE THE COURT, IS UNCONSTITUTIONAL, AND, EVEN IF CONSTITUTIONAL, PROPERLY CONSTRUED, DOES NOT AUTHORIZE THE ASSESSMENT OF $1,831,000.

As the Supreme Court of Hawaii adopted our construction of Section 1, Act 88, of the Session Laws of 1905, the appellant is not complaining of that portion of the decision; but as it may be argued that the assessment as finally made can be justified under that act, we will repeat in substance the argument made by us in the Hawaiian court.

The assessment as proposed by the assessor of $1,831,000 was arrived at by adding together the par value of the common stock, preferred stock and bonds of the appellant, which the assessor claimed to be the "capital issues" referred to in the act, less $9000 of exemption. The preferred and common stock issued by the corporation amount to $1,150,000, the remaining $690,000 being represented by bonds.

Our position is:

(a) That the law is unconstitutional; and

(b) If constitutional, the inclusion of bonds in the value is not authorized.

A.

The act in question provides that the combined property of every corporation holding a public utility franchise and occupying the public streets or highways of the Territory shall be valued and assessed at not less than the total amount of the par value of the capital issues emitted by such corporation. This is radically unconstitutional in two particulars: (1) It classifies property according to its ownership by a certain very limited class of corporations, and (2) it fixes an arbitrary valuation upon such property.

(1) The Legislature cannot classify property according to its ownership.

It will be observed at the outset that this tax levied under the Act of 1905 is a property tax. It is not a franchise tax in the sense of being a tax on the privilege of doing business.

"The Legislature intended to tax only the property forming the basis of an enterprise for profit, and did not intend to tax the enterprise as such itself."

Inter-Island Steam Nav. Co. v. Shaw, 10 Haw. 624.

In taxing various kinds of property, it is within the power of the Legislature to classify different kinds and species of property within certain limits, provided the classification is not arbitrary but rests upon a reasonable basis. Here, however, the Legislature has not put into this class different kinds of property, but has attempted to tax property upon a different basis, according as to whether it is owned by a particular class of corporation or not.

"Arbitrary classification by the Legislature of property or persons for the purpose of taxation, without regard to any system, is not generally permitted, and any separation into classes must rest on reasonable grounds."

27 Am. & Eng. Enc. of Law, 603.

"It was admitted that the State could classify property for taxation, but it was said that the classification must rest on some reason other than mere ownership, and that different pieces of property of the same kind held or used for the same purposes within the same jurisdiction could not lawfully be so classified, as that one is subject to the tax and the other exempt, merely because one belongs to a natural person and the other to a corporation."

Judson on Taxation, Sec. 455; discussing *Russell v. Croy*, 164 Mo. 69.

A leading case on this subject is *The Railroad Tax Cases*, 13 Fed. 722. In this case the Constitution of California prescribed that, in taxing property, mortgages should be deducted; except as to the property of railroads, where no such deduction was allowed. This was held to be in violation of the 14th Amendment. The court says:

"It is no answer to this discrimination to say that property in the state may be divided into classes, and different rates prescribed for them. Undoubtedly property may be classified for purposes of taxation. Real property may be subjected to one rate of taxation; personal property to another rate. Property in particular districts may be taxed for local purposes, while property elsewhere may be exempt. Taxation on business in the form of licenses may also vary according to the calling or occupation licensed, and the extent of business transacted, but even then there must be uniformity of charges with respect to the same calling or occupation in the same locality. It is, however, only with taxation of property that we are concerned in this case, and the whole object of classifying property is that each class may be subjected to a special rate of taxation. There is no difference in the rate prescribed by the law of the state for the property of railroad corporations, and the rate prescribed for the property of individuals. There is only one rate for all property. There is, therefore, no case presented for the application of the doctrine of classification. The discrimination complained of arises from the different rule adopted in ascertaining the value of the property of railroad corporations as a basis for taxation, not from any different rate of taxation when the value is established. In all taxes upon property, whatever its form or nature, the property is taken as representing a pecuniary value; as standing for so much money invested. The tax is the

rate per centum of this pecuniary value. The value being ascertained, the law fixes the rate. The ground of complaint here is that the law requires a higher value to be placed upon the defendant's property than upon the property of individuals similarly incumbered, or rather requires the assessor of the defendant's property, in estimating its value, to disregard and set aside certain elements materially affecting its amount, which are to be considered in estimating the value of the property of individuals. It is not classifying property to make this distinction in determining its value. It is not classifying property to provide that the property of certain parties, which has a mortgage upon it, shall be assessed at its value after deducting the mortgage; and that the property of other parties, also having a mortgage upon it, shall be taxed at its full value without any deduction. That is not providing for a different rate of taxation for different kinds of property, but for unequal taxation according to the character of the owner."

The Railroad Tax Cases, 13 Fed. 722, p. 737.

Another case interesting as showing the application of the 14th Amendment to taxation within a territory is *Northern Pac. R. Co. v. Walker*, 47 Fed. 681. The court in this case says:

"While property may be classified for the purposes of taxation, between the subjects of taxation in the same class there must be equality. Property of the same kiad, and in the same condition, and used for the same purpose, cannot be divided into different classes for purposes of taxation, and taxed by a different rule, because it belongs to different owners. But this is precisely what the act under consideration seeks to do. It exempts the lands of the company from taxation simply and solely because they belong to the company, and taxes all other lands by a uniform rule according to their value. It is not competent for the legislature, either under the organic act or the fourteenth amendment of the constitution of the United States, to classify the lands in the territory, for purposes of taxation, into lands owned by railroad companies and lands owned by all other persons, and declare that the former should not and the latter should be taxed."

Northern Pac. R. Co. v. Walker, 47 Fed. 681, p. 686.

See also:

Central Railroad Co. v. Assessors, 48 N. J. L. 1.

Darcy v. San Jose, 104 Cal. 642.

Standard Ins. Co. v. Assessors, 95 Mich. 466.

Black v. State, 113 Wis. 205.

Juanita Limestone Co. v. Fagney, 187 Pa. St. 193.

Gulf, Colorado & Santa Fe R. Co. v. Ellis, 165 U. S. 150.

(2) The Legislature cannot put an arbitrary valuation upon property for the purpose of taxation.

The law in question is one step worse than an arbitrary valuation, because it provides that the property shall be valued and assessed at *not less* than a specified amount. Taxes upon the privilege of doing business may be somewhat arbitrary in amount, but a property tax must be upon the value of the property.

Inter-Island Steam Nav. Co. v. Shaw, 10 Haw. 624, p. 632.

It is a fundamental principle of property taxation that the power of fixing the value cannot be exercised by the Legislature, but that it must be left to the assessor.

The Legislature cannot make the valuations of property for taxation.

Cooley on Taxation, 753.

"The fundamental law requires general taxes to be laid according to the value of the property of the tax-payers, and no arbitrary assessment can be made either by statute or ordinance."

27 Am. & Eng. Enc. of Law, 662.

In Colorado, owing to the difficulty of assessing the true value of mining deposits still hidden in the ground, a proposed statute provided that all lode claims should be valued at seventy dollars per acre and all placer claims at twenty-five dollars per acre, surface measurement. Held unconstitutional.

Taxation of Mining Claims, 9 Col. 635.

"But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation."

Western Union Tel. Co. v. Attorney-General, 125 U. S. 530, p. 547.

In *Home Insurance Company v. New York*, 134 U. S. 594, the tax was upon the corporate franchise or business of the company, and the court emphasizes the distinction already taken in another case, cited as follows:

"It is true as said by this court in *California v. Pacific Railroad Company*, 127 U. S. 1, 41, that the taxation of a corporate franchise has no limitation, but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the legislature may choose, it may be arbitrarily laid without any valuation put upon the franchise."

Home Ins. Co. v. New York, 134 U. S. 594, 600.

In none of the cases cited was there an attempt at arbitrary classification of property shown in the Hawaiian statute, and most of the cases refer specifically to this feature.

"The statute in question provides a general system for taxation and assessment and valuation of property, and the method of ascertaining the value and assessing each class and kind of property applies alike to all persons holding and owning the same class of property."

Cleveland Co. v. Bachus, 133 Ind. 513, 531.

"This statute of Massachusetts is intended to govern the taxation of all corporations therein and doing business within its territory."

Western Union Telegraph Co. v. Attorney-General, 125 U. S. 530, 553.

"The tax is imposed equally on corporations doing business within the state, whether domestic or foreign and whether engaged in interstate commerce or not."

Pullman Car Co. v. Pennsylvania, 141 U. S. 18, 25.

"Under the Statute of New York all corporations, joint stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class."

Home Insurance Co. v. New York, 134 U. S. 594, 607.

"The law does not make any discrimination in this regard which the state is not competent to make. All corporate securities are subject to the same regulations."

Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232, 237.

We think that the line of decisions containing such expressions as these is hardly applicable to the construction of the Statute, which is designed to and does actually affect not more than two or three corporations out of the hundreds doing business in the Territory of Hawaii.

B.

If the act in question is constitutional, we submit that its proper interpretation will necessitate eliminating the bonds and assessing only on the par value of the capital stock. This is a question of the definition of the phrase "capital issues," or, if there is any doubt as to that definition, then it is a question of what rule of construction should be applied in interpretating a doubtful statute of this kind.

There can be no question as to the meaning of the word "issues." An issue in this sense is whatever is emitted or put out by the corporation. The corporation issues bonds, stock, notes, transfer tickets, school tickets and other forms of obligation. The question is, which of these issues comes under the word "capital."

The word "capital," both as an adjective and as a noun, has been often defined, and in its ordinary business acceptation it

is never held to include man's debts or the bonds of a corporation. It is true that the capital stock of the corporation is carried on its books as a debit, but it is not a debt in the sense that it is money actually owing to the stockholders. It is equivalent of what the stockholders have themselves contributed. Bonds, however, are debts pure and simple, secured by mortgage upon the property of the corporation. This proposition seems plain, but we submit a few definitions.

Capital. "As commonly used to indicate financial resources it implies ownership, and *does not*, without qualification *include borrowed money.*"

Century Dictionary.

"Capital is the fund dedicated to a business to support its credit, to provide for contingencies, to suffer diminution from loss, and to derive accretion from gains and profits."

Lyon v. Zimmer, 30 Fed. Rep. 401.

"Under the United States statute of 1864 providing for a tax on the capital employed by any person in the business of banking, capital does not include money borrowed in the ordinary course of business by a copartnership firm engaged in the business of banking. The court said: 'The term capital, in the statute, has its ordinary signification, as universally used in trade, commerce, manufacturing, and other specific business. It is that stock in trade which, irrespective of particular transactions or dealings, constitutes the basis of credit, or the fund belonging to the person, invested in the business. It is money or property appropriated to the purposes of the business of a person or firm, analogous to the capital in a corporation, derived or derivable from the contribution of stockholders, and denominated *capital stock* * * *. In the case of a copartnership, the meaning of the term *capital* is very closely analogous to the same term applied to a corporation. It is the *capital stock*, or stock in trade. It is the basis of the joint adventures—the contribution of the several copartners; a ground upon which, in general, distribution of profits proceeds, in whole or in part * * *. It is not according to the ordinary use of language, and, as I think not according to any proper use of language, to say, of a mercantile firm, that every discount which they pro-

cure at bank is so much added to their capital; and yet, if they buy goods with the proceeds, they use such proceeds in their business. It would not satisfy the demands of common honesty, if a man, engaged in business of any kind, being asked the amount of *capital* employed in his business, should include in his reply all the sums which, in the conduct of his business, he had borrowed and had not yet repaid. When the debts of a copartnership are paid, what remains is *capital,* or capital and profits, as the case may be."

Clark v. Bailey, 12 Blatchf. (U. S.) 158, affirmed 21 Wall. (U. S.) 284.

Same—Clear of Debt. "Capital properly means property which one has clear of debt."

Haslett v. Wetherspoon, 1 Strobh. Eq. (S. Car.).

We submit that these definitions are decisive in favor of our contention that bonds should not be included in capital issues. If, however, there is any doubt upon the matter, that doubt must be resolved in our favor and against the government. If the Legislature intended to enact the absurd proposition that the more debt a corporation has the more property it has, it should have said so in clear and unmistakable language. It would have been very easy to insert the word "bonds" if that had been intended. In the absence of clear and unmistakable language, a tax-payer must be given the benefit of the doubt.

"It is thought to be only reasonable to intend that the legislature * * * would take unusual care to make use of terms which would plainly express its meaning, in order that ministerial officers might not be left in doubt in the exercise of unusual powers, and that the citizen might know exactly what were his duties and liabilities. A strict construction in such cases seems reasonable, because presumptively the legislature has given in plain terms all the power it has intended should be exercised."

Cooley on Taxation, 453.

"It is, I conceive, a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to

embrace matters not specifically pointed out although standing upon a close analogy. In every case therefore of doubt such statutes are construed most strongly against the government, and in favor of the subjects or citizens, because burdens are not to be imposed or presume to be imposed, beyond what the statutes expressly and clearly import."

Story, J., in *U. S. v. Wigglesworth*, 2 Story 369, 373; cited Cooley Taxation, 456.

Respectfully submitted,

ALDIS B. BROWNE,

ALEXANDER BRITTON,

WILLIAM R. CASTLE,

DAVID L. WITHINGTON,

For the Appellants.

APPENDIX.

ACT OF THE LEGISLATURE OF THE REPUBLIC OF HAWAII, APPROVED JULY 7, 1898.

SECTION 1. Wherever in this Act the following words occur they shall be held to have the force and meaning herein set forth unless the context clearly indicates otherwise:

"Said Association and others" shall represent and mean Clinton G. Ballentyne, Frederick J. Lowrey, Theodore F. Lansing, James A. Kennedy, Charles S. Desky, Joseph A. Gilman, James F. Morgan, George R. Carter and J. H. Soper, their associates and assigns, or such corporation as may be organized by them, as named in the second Section of this Act.

"Executive Council" shall refer to and mean the Council designated as the Executive Council in the Constitution of the Republic.

"Minister of the Interior" shall refer to and mean the person from time to time acting as the Minister of the Interior as defined in said Constitution, or his lawful successor in said office.

"Railway" shall refer to and mean the rails, tracks, roadway, with its appurtenances, appliances and connections to be placed in streets, roads or places on the Island of Oahu, as by this Act provided, or to such rails, tracks, roadway, etc., of any other corporation as may now be in existence or that may hereafter be laid.

"Honolulu" or "District of Honolulu" shall refer to and mean all of that portion of the Island of Oahu included in the judicial, educational and taxation district, now defined by law as the "District of Honolulu" or "Honolulu District."

RIGHT OF WAY.

SECTION 2. The right is hereby granted to Clinton G. Ballentyne, Frederick J. Lowrey, Theodore F. Lansing, James A. Kennedy, Charles S. Desky, Joseph A. Gilman, James F. Morgan, George R. Carter and J. H. Soper, and to their associates and assigns or to such corporation as may be organized by them, to construct, lay down, maintain and operate for the term of thirty years, after the railway authorized by this Act shall have been commenced, a railway, either single or double track, or partly single and partly double, with such curves, switches, turnouts, poles, wires, underground or overhead conduits, and such other appliances and appurtenances as may from time to time be necessary for the use and operation thereof, shall and upon the following

streets, roads and places, in the District of Honolulu, upon said Island of Oahu, to-wit:

(Here follows names of streets.)

MOTIVE POWER.

SECTION 3. 1st. The said railway shall be operated by electric power, either by overhead or underground wires or by storage batteries, or by such other method as may be an improvement upon either; or by compressed air; or by such other motive power as the said association and others may from time to time elect, subject nevertheless to the prior consent and approval of the Executive Council. Provided, * * *

3rd. The motive power by this Section authorized may be used for all of the purpose of railway traffic, either in the transportation of passengers, mail, freight or otherwise.

CHARGES UPON EARNINGS.

SECTION 17. The following charges shall be lawful upon the income of said railway:

1st. The expense of operating, repairs, renewals, extensions, interest, and every other cost and charge properly or necessarily connected with the maintenance and operation of said railway.

2nd. Dividends may be paid to the stockholders not to exceed eight per cent. on the par value of the stock issued.

3rd. A sinking fund may be created for the redemption of any bond which may be issued or other record debt and the capital upon the expiration of the franchise. Provided, however, that the amount placed to the credit of such sinking fund annually, shall not exceed in amount, such a sum with interest computed at five per cent. per annum, compounded, as will principal and interest combined, at maturity, equal the par value of the bonds, record and capital debt aforesaid.

4th. The excess of income shall be divided equally between the Government of the Republic of Hawaii and the stockholders of said corporation.

5th. A quarterly account or trial balance of the corporation shall be rendered by the corporation to the Ministers of the Interior from the beginning of the actual construction of the railway.

RESERVED RIGHTS AND AUTHORITY AT LAW.

SECTION 29. 1st. Except as by this Act otherwise so provided, the rights and privileges named in Section 2 hereof are granted to the said association and others upon such terms, conditions and restrictions as now are or may hereafter be imposed by the laws of the Republic of Hawaii in relation to the matter of constructing and maintaining street railways in the District

of Honolulu, Island of Oahu, and a strict compliance with such laws is hereby required of the said association and others.

2nd. The right to grade, sewer, pave, macadamize or otherwise improve, alter or repair any or all of the streets, roads or highways above mentioned, and of all other places in said Republic, is reserved to the Government, and may not be alienated or impaired; but any work in carrying out and performing such reserved rights shall be done in such manner as to obstruct or injure the railway hereby authorized as little as possible; but, if such improvement, alteration or work in accordance herewith upon such streets, or roads, necessarily interferes with the grade of such railway, the said railway shall be altered and made to correspond with the improvements, alteration or grade, immediately upon being so required.

3rd. The said association and others, before laying the railway upon any of the streets or roads in the District of Honolulu, shall ascertain the lawful grade of such streets or roads from the Minister of the Interior, who shall furnish the required information within a reasonable time. The tracks of such association and others shall conform to the grades of said streets or roads on which they are laid down as furnished by the Minister of the Interior or other officer duly appointed by him, and the said association and others shall not in any way change or alter the same without the written consent of the Executive Council. And the Hawaiian Government reserves forever the right to change the line and grades of its streets at any time that the public interests demand such changes; and the said association and others, shall, at its own cost, within thirty days, conform to such new lines or grades in constructing its tracks or lines, upon receiving notice in writing from the Minister of the Interior, and such changes shall be made subject to the approval of the Minister of the Interior. And in all cases of street improvements by the Government, the said association and others shall conform to all such improvements, in the kind of pavement and the manner of laying the same, as directed by the Minister of the Interior.

In case of neglect by the said association and others to make such repairs, changes or improvements required of it by this Section, they shall be made by the officers, servants and employees of the Hawaiian Government, and the cost of such repairs, changes or improvements may be recovered by the said Government, from the said association and others.

SECTION 30. All material required by the said association and others to be used for the purpose of this Act, when imported from the United States, and being the product or manufacture of the said United States shall be free of duty, and the property of the said association and others shall not be liable to internal taxation while said railway is under construction, provided that as fast as completed and equipped the completed and equipped portions shall become liable to such taxation.

SECTION 31. Said Railway or Corporation shall pay in annual payments to the Department of the Interior the sum of ten dollars per annum as a license tax upon each passenger car used by it or them, and no greater sum shall be exacted as Car License.

SECTION 32. All orders, permits, or approvals, as provided for in this Act, shall be in writing.

SECTION 33. The entire plant, operation, books and accounts of the said association and others shall from time to time be subject to the inspection of the Minister of the Interior or other officer appointed by him for the purpose.

SECTION 34. None of the rights or privileges enumerated in this Act shall be exercised by the persons forming the association set forth in Section 1, nor by their assigns, until a corporation shall have been duly organized under the laws of this Republic, for the purpose of constructing, operating and maintaining the lines of railway mentioned in this Act, having a capital stock of not less than two hundred thousand dollars and all the said rights and privileges assigned to said corporation without reserve.

SECTION 35. The said association and others shall provide such receptacles upon their street cars as shall be approved by the Postmaster-General for the conveyance free of charge of all letters.

SECTION 36. Whenever the said association and others or any corporation which may have been duly organized under the laws of this Republic for the purpose of constructing, operating and maintaining the lines of railway mentioned in this Act, and as by this Act provided, refuses to do or fails to do or perform or carry out or comply with any act, matter or thing requisite or required to be done under the provisions of this Act and shall continue so to refuse or fail to do or perform or carry out or comply therewith, after due notice by the Minister of the Interior to comply therewith, the Minister of the Interior shall with the consent of the Executive Council, cause proceedings to be instituted before the proper tribunal to have the franchise granted by this Act and all rights and privileges granted hereunder, forfeited and declared null and void.

SECTION 37. It shall not be lawful to increase the capital stock of said corporation, at any time in excess of said two hundred thousand dollars, unless the proposed increase shall when taken with the said original capital stock, represent only the actual cost of the property of the railway, and not over twenty-five per cent. of such cost in addition thereto; such cost may include all expense, of laying tracks and equipping the road for public use, and may also include all subsequent extensions, but no such increase shall be authorized for extensions until they shall be determined upon and authorized by a vote of the corporation.

ACT "TO PROVIDE A GOVERNMENT FOR THE TERRITORY OF HAWAII," APRIL 30, 1900.

(31 Sts. at L. 141 C. 339)

SECTION 73. That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land-commission awards, except, as changed by this Act, shall continue in force until Congress shall otherwise provide. That, subject to the approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii, between the seventh day of July, eighteen hundred and ninety-eight, and the twenty-eighth day of September, eighteen hundred and ninety-nine, are hereby ratified and confirmed. * * *

NO. 4070.

UNITED STATES OF AMERICA,

DEPARTMENT OF STATE.

To all to whom these presents shall come:

I certify that the copy hereto annexed is a true copy of the President's approval of the charter of the Honolulu Rapid Transit & Land Company, of the Island of Oahu, Hawaii.

[SEAL] In testimony whereof I, John Hay, Secretary of State of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed.

Done at the City of Washington this 25th day of June, A. D. 1900, and of the Independence of the United States of America the One Hundred and Twenty-fourth.

JOHN HAY.

WHEREAS, by the seventy-third section of an act entitled "An Act to provide a government for the Territory of Hawaii," approved April 30th, 1900, it was, among other things, provided as follows: "That subject to the approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian Government in conformity with the laws of Hawaii, between the 7th day of July, 1898, and the 28th day of September, 1899, are hereby ratified and confirmed;" and,

WHEREAS, it appears by the certificate of Sanford B. Dole, President of the Republic of Hawaii, which certificate bears date the 23rd day of May, A. D. 1900, that the Honolulu Rapid Tran-

sit & Land Company, organized under an act entitled, "An Act to authorize and provide for the construction, maintenance and operation of a street railway or railways in the district of Honolulu, Island of Oahu," was incorporated on the 30th day of August, A. D. 1898, under a charter of incorporation, a copy whereof is attached to said certificate; and that said incorporating and granting of said charter of incorporation were made in conformity with the general incorporating acts of the Republic of Hawaii, and that the granting of the franchise conferred thereby, and all acts done and proceedings taken in the premises were done and proceedings taken in conformity with the laws of the Republic of Hawaii;

NOW, THEREFORE, in conformity to the provision of the act aforesaid, the said franchise granted by the Hawaiian government to the Honolulu Rapid Transit & Land Company is hereby approved.

WILLIAM MCKINLEY.

THE REVISED LAWS OF HAWAII, 1905.

SECTION 1212. *Property Tax.* Except as otherwise provided, all real property and all personal property within the Territory shall be subject to an annual tax of one per cent. upon the full cash value of the same.

SECTION 1216. *Basis of value of taxation.* All real and personal property and the interest of any person in any real or personal property shall be assessed separately as to each item thereof for its full cash value.

Provided, however, that in all cases where real and personal property or several classes or kinds or parcels of real or personal property respectively, are combined and made the basis of an enterprise for profit, the combined property forming such basis of such enterprise for profit, shall be assessed as a whole on its fair and reasonable aggregate value.

Provided also, that the combined property of every corporation holding a public utility franchise and occupying the public streets or highways of the Territory, other than any such corporation that by the terms of its franchise is required to pay a percentage of its gross income to the Territory, shall be valued and assessed at not less than the total amount of the par value of the capital issues emitted by such corporation.

In estimating the aggregate value of each such enterprise for profit, there shall be taken into consideration the net profits made by the same, also the gross receipts and actual running expenses; and where it is a company being a corporation whose stock is quoted in the market, the market price thereof, as well as all other facts and considerations which reasonably and fairly bear upon such valuation.

In ascertaining the agregate value of the property constituting the basis of an enterprise for profit for the purpose indicated by this Section, there shall first be included all property combined and forming the basis of such enterprise whether within the definition of real or personal property set forth in this chapter or not, and there then shall be deducted therefrom the value of shares in other Hawaiian corporations, held or owned by such enterprise, the value of all property on which specific taxes are levied and the value of all property that would not be taxable if not so combined and made the basis of an enterprise for profit. And ———— * * * (amended Act 88 of Laws of 1905.)

SECTION 1243. *Notice of raise in value.* In case any assessor shall raise the valuation of any property above the value stated in the assessment return in this chapter provided for, or shall refuse to allow a claim for exemption, such assessor shall, on or before April 1 of each year, send a written or printed notice by depositing the same in the Post Office, postage prepaid, addressed to the last known place of residence of the person making the return or claiming the exemption, describing the property, the valuation of which has been so raised, and stating the proposed assessment thereof, or stating the exemption refused, as the case may be.

SECTION 1244. *Tax list open to public.* It shall be the duty of each assessor or his deputy to attend on all days except Sundays between May 1 and May 15, both inclusive, of each year, at some convenient place or places in his division or district, between the hours of eight o'clock in the forenoon and five o'clock in the afternoon with his assessment or tax list, which shall during such times be open for the inspection of all persons liable to taxation in the district without fee or reward.

Written or printed notice of such places shall be given by advertisement in a weekly newspaper, and by posting a notice in at least eight conspicuous places in each district of the times and places at which such tax lists shall be open for inspection in such district.

SECTION 1248. *Appeal court, appointment.* Three suitable persons shall be appointed by the governor of the Territory of Hawaii, for each judicial circuit, to hold office for one year, who shall respectively constitute courts of appeal to hear and determine all appeals and objections duly taken under this chapter, in their several circuits; *provided*, however, that no assessor or his deputy shall be appointed to sit as a member of any such court of appeal.

SECTION 1254. *Tax list to conform to decision.* The assessor shall alter or amend the taxation list and copy thereof, in conformity with the decision of the court.

APPEAL TO SUPREME COURT.

SECTION 1255. *How made.* If any tax appeal court shall reduce the valuation of any property below the valuation placed

thereon by the assessor, or shall value the property at a greater valuation than that placed thereon in his tax return by the person making the return thereof, the tax assessor or the taxpayer, as the case may be, may at any time within twenty days appeal to the supreme court from such decision of such tax court, by filing a notice of appeal, and if the appellant is the taxpayer, depositing with the chairman of such court the sum of one hundred dollars, or file in lieu thereof a bond with sufficient surety to the clerk of the supreme court in the sum of one hundred dollars, conditioned to pay all costs of such appeal in case the same is not sustained.

SECTION 1256. *Certificate of.* Upon any appeal being perfected as aforesaid the chairman of the tax appeal court from which such appeal is taken shall immediately certify up to the supreme court the record of all proceedings had before such tax appeal court, in and concerning such cause, in which certificate there shall be set forth:

1. The valuation of the property in dispute, claimed by the assessor;
2. The valuation of the same, claimed by the taxpayer;
3. The valuation placed thereon by the tax appeal court.

Such certificate shall be accompanied by a copy of the evidence taken before such tax appeal court and the decision of such court in such cause.

SECTION 1257. *Evidence.* Upon any appeal to the supreme court under the provisions of this chapter, the evidence taken before the tax appeal court in connection with such appealed cause, shall be considered by the supreme court, and it may also in its discretion allow further evidence to be introduced by either party.

Office Supreme Court, U. S.
FILED.
OCT 28 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 23.

THE HONOLULU RAPID TRANSIT AND LAND COMPANY, APPELLANT,

vs.

JAMES L. HOLT, ASSESSOR.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

SUPPLEMENTAL BRIEF FOR APPELLANT.

DAVID L. WITHINGTON,
WILLIAM R. CASTLE,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
Attorneys for Appellant.

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SUPPLEMENTAL BRIEF FOR APPELLANT.

I.

That the "franchise" is taxed *as such* is not open to doubt. It is so distinctly stated and scheduled by the Tax Appeal Court (R., 15) *in terms*. That decision was affirmed by the Supreme Court below (R., 25). Hence upon the record the question is sharply and distinctly raised, viz., is the franchise as such subject to taxation? and the affirmative ruling thereon below is assigned here for error (Assignment 1, R., 27).

That the franchise when granted becomes property and, like land or other tangible thing, subject to taxation, unless exempted therefrom, is now well settled. The last, and certainly the emphatic, ruling of this court in *Metropolitan Street Ry. Co. v. New York*, 199 U. S., 1, settles that point.

The exemption must "be clearly proved." A concise, clear statement of the rule is given in *Wells v. Savannah,* 181 U. S., 531, 539, and which is thus quoted in the New York case, *supra,* at p. 36:

> "The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment, and the validity of such contract presupposes a good consideration therefor. If the property be in its nature taxable the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract expressed in terms, *or else it must be implied from facts which leave no room for doubt that such was the intention of the parties,* and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven and the exemption does not exist."

That the act of the Territory of Hawaii conferring the right upon the corporation appellant here to construct, maintain and operate this street railroad system in Honolulu for thirty years is a contract does not admit of doubt; that it was given upon and for a consideration moving to the Territory is equally plain, because by section 17 thereof it was provided that against the gross income of the company "the " following charges shall be lawful," (1) all costs and charges " connected with the maintenance and operation of said rail- " way," (2) dividends not exceeding 8 per cent. par value on issued capital stock, (3) sinking fund sufficient to redeem at maturity (*i. e.,* expiration of charter—30 years), "the par " value of the bonds, record and capital debt aforesaid." With these prescribed charges upon gross income deducted, the provision then is—

" 4th. The excess of income shall be divided equally be- " tween the Government of the Republic of Hawaii and the " stockholders of said corporation."

" 5th. A quarterly account or trial balance of the cor- " poration shall be rendered by the corporation to the Minis-

" ters of the Interior from the beginning of the actual con-
" struction of the railway."

All that the Territory here invested in the enterprise *as property* was the franchise—the right to construct, maintain and operate the railway. For that investment the Territory chose to receive as compensation an equal share in the net income of the railway after deduction *only* of the items specified *supra*. The property invested by the stockholders—the rails—equipment and tangible plant, became by section 30 of the charter contract subject to taxation. The exact language is—

> "and the property of the said association and others shall not be liable to internal taxation while said railway is under construction, provided that as fast as completed and equipped the completed and equipped portion shall become liable to such taxation."

Clearly, then, the share contributed by the *company* on which income could be earned was subject to taxation. Upon that point there is no dispute. But could the Territory first invest its share—*i. e.*, the operating franchises—as property: fix its share of receipts from the combined property, franchises and structure, and still tax *its* investment—*i. e.*, the value of the franchises—as against the stockholders, while at the same time contracting to exact as *its* consideration for the property so invested by it one-half of the excess income as provided *supra*? Is there any theory of contractual relation *inter parties* which admits such a conclusion? The charter contains no reserved power of alteration, amendment or repeal. The contract is complete as it stands. Thereunder the Territory can exact its stated share of the earnings from the combined property. Can it, under the terms of such contract, say that it may, nevertheless, *first* tax the property *it* has put into the enterprise and yet claim *also* the one-half of "the excess of income" as provided in section 17 thereof? Under such plain contract can there be any doubt? Do we not, within the meaning and the language of the court in *Wells v. Savannah, supra*, show (1) "a contract expressed in

"terms" or else (2) "implied from facts which leave no room "for doubt that such was the intention of the parties, and "that a valid consideration existed for the contract"?

It is true that Mr. Justice Brewer, in the opinion in the New York Franchise case, states broadly:

> "This rule is akin to, if not a part of, the broad proposition, now universally accepted, that in grants from the public nothing passes by implication" (p. 37).

But this expression is to be taken in connection with the language of the cases cited by the learned justice, which include that of Mr. Justice Peckham, in *Wells v. Savannah ubi supra:* that of the same justice in *Chicago Theological Seminary v. Illinois*, 108 U. S., 662, "It cannot exist by implication *only:* a doubt is fatal to the claim:" in which the learned justice was repeating the rule of construction followed by the Supreme Court of Illinois. The cases cited by him show that the emphasis is on the word "doubt" and not the word "implication." "The language in which the surrender is made must be clear and unmistakable" (*Erie Ry. Co. v. Pennsylvania*, 21 Wall., 492). "Unless the deliberate purpose of the State to that effect clearly appears" (*Wilmington & Weldon Ry. v. Alsbrook*, 146 U. S., 279): and "unless within the express letter or the necessary scope of the exempting clause" (*Ford v. Delta & Pine Land Co.*, 164 U. S., 662): and that of Chief Justice Taney in *The Charles River Bridge v. Warren Bridge*, 11 Pet., 420, on which it is especially rested, an examination of which shows that all the great chief justice meant is that the contract construing the words in their natural and proper construction, contained "no words which import such a contract as the plaintiffs in error contend for, and none can be implied" (p. 459).

But the question whether a contract for a franchise, and the terms thereof, can be implied where there are no express words of grant has been before this court in a more recent case, the court holding that a franchise expiring in 1904

was by implication extended by the grant of a further franchise, which recited "and the grant here granted shall terminate with the present grant of the main line, to wit, the 10th day of February, 1908" (*Cleveland v. Cleveland Elec. Ry. Co.*, 201 U. S., 529).

We respectfully suggest that the language employed is broader than the rule, and that the citations show that what is meant is that nothing will pass by *mere* implication: that a doubt is fatal to the claim, but that if the whole contract excludes the idea of the power to tax the franchise the exemption from such taxation is a part of the contract.

Certainly, in any other view the Territory could tax the *franchise* to such an amount as to absorb all dividends. The *power* to so tax, if existing, is unrestricted to the extent of reaching precisely such result. Certainly, the individuals who invested their money in building and equipping this railway understood (1) that the property *they* created must pay taxes, but as certainly they had the clear right to understand that the property the Territory invested—the franchise—was to yield its return to the Territory in the way clearly expressed by the charter contract and in no other. This result does not impinge upon the rule that all such grants from the sovereign must be construed strictly. The meaning thus given the contract is the fair, just and reasonable understanding derivable from the language used therein. Any other construction would impose (1) a primary tax or charge for the property invested by the Territory against the gross income (and having preference over all other charges because subjecting the entire property to sale for non-payment), and (2) further payment for the use of the same property—the franchise—by division of the excess income in equal shares with the Territory.

Hence the claim of right to thus tax the *franchise* under the authority of the later Territorial Act of 1905 is untenable. As was said by Alexander Hamilton in his celebrated communication to the Senate of January 20, 1795:

> "When a government enters into a contract with an individual, it descends, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges with a power to make a law which can vary the effect of it."
>
> 3 *Hamilton's Works*, 518, 519.

And in the *Sinking Fund cases* (99 U. S., 700, 719) the court, speaking by Mr. Chief Justice Waite, said:

> "The United States are as much bound by their contracts as are individuals. * * * No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds without the consent of the corporation. All this is indisputable."

II.

There is another point to which we call the court's attention, which is raised by the respondent on pages 4, 5, and 6 of its brief, in which it assumes that, on page 21 of our brief, we have likened the condition of our franchise to that of the bank franchise granted by the Territory of Wisconsin in the case cited.

But the conditions are entirely dissimilar. Hawaii and the United States had entered into a treaty for the annexation of the islands to the United States, then pending before the Senate. The Newlands resolution recited in its preamble the consent of the Republic of Hawaii "to cede absolutely and without reserve to the United States of America all rights of sovereignty, of whatever kind, in and over the Hawaiian Islands." By another clause of the resolution it is declared: "The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands, but the Congress of the United States shall enact special laws for their management and disposition." As the

same clause provided for disposition of their proceeds, the Hawaiian government proceeded to make sales of land until stopped by the opinion of Attorney General Griggs, September 9, 1899 (22 Opins. of the Attorney General, p. 574), and the Executive Proclamation issued thereon. In this opinion the Attorney General cites from *Harcourt v. Gailliard*, 12 Wheaton, 523:

> "Those laws of the former government which have for their object a certain governmental public policy, of which character are laws for the disposition of the public domain and the granting of *quasi public franchises, rights and privileges to private individuals of corporations*, ceased to have any force or effect after the sovereignty of the former government ceased."

Two other opinions of a similar nature were rendered by him at about the same time (22 Opins. of the Attorney General, pp. 578-587), the former overruling the decision of the Supreme Court of Hawaii in reference to the registration of vessels, on the ground that such was an act of a sovereignty which ceased on the 7th day of July, 1898. An attempt was made to have this opinion reversed, and as it vitally affected the capitalists who were about to build the street railway of the appellant—in fact the news of the decision reached Hawaii just at the time the contracts were about to be signed—the Hawaiian government and the appellant here jointly applied to the Attorney General for a revision of his opinion that the power of Hawaii to dispose of public lands, grant franchises, or do any other acts which involved the exercise of sovereign rights, ceased upon the 7th day of July. In reply to this the Attorney General gave an opinion to the President, affirming his previous conclusion, upon the 21st day of November, 1899 (22 Opins. of the Attorney General, p. 627). In consequence of this the provision in question (section 73 of the Organic Act) was inserted and the approval of the President obtained.

This statement is enough to show the distinction between this case and the case cited by respondent. But that case

and the case of *Lyons v. Woods*, 153 U. S., 661, cited by it to this point, are best disposed of by this court in an Arizona case, several times before this court, in which it said of these cases:

> "In the first case, the territorial legislature of Wisconsin chartered the Miners' Bank. Afterwards, an act of Congress annulled the charter in certain particulars, but left other provisions in force. Thereafter, the Territory was divided by an act of Congress, and the Territory of Iowa erected over that former part of the Territory of Wisconsin in which the bank was located. Later the territorial legislature of Iowa repealed the charter, and directed the settlement of the affairs of the corporation by trustees under the supervision of the court. It was held that the annulment of several of the provisions of the bank's charter did not make the charter of the bank a Congressional charter, but that it still remained a charter of the legislature of Wisconsin, and that no Federal question arose from the repeal of that charter by the legislature of Iowa. The case is totally different from the one under consideration, and that of *Lyons v. Woods* is equally so. There is a plain distinction between an act of Congress amending a territorial act by adding or striking out particular provisions and one re-enacting it substantially in all its provisions."
>
> *Murphy v. Utter*, 186 U. S., 95, 106.

Distinction is obvious between a franchise which the Territory had the right to grant, but which might be modified or disapproved by Congress, and the case of a franchise which the sovereignty had no power to grant, and which, even if it had that power, not having been accepted and acted upon by the grantees, fell upon the accession of the new sovereignty.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1907.

No. 23.

HONOLULU RAPID TRANSIT & LAND COMPANY,
Appellant,
vs.
JAMES L. HOLT, Assessor,
Appellee.

Appeal from Supreme Court of the Territory of Hawaii.

BRIEF FOR APPELLANT.

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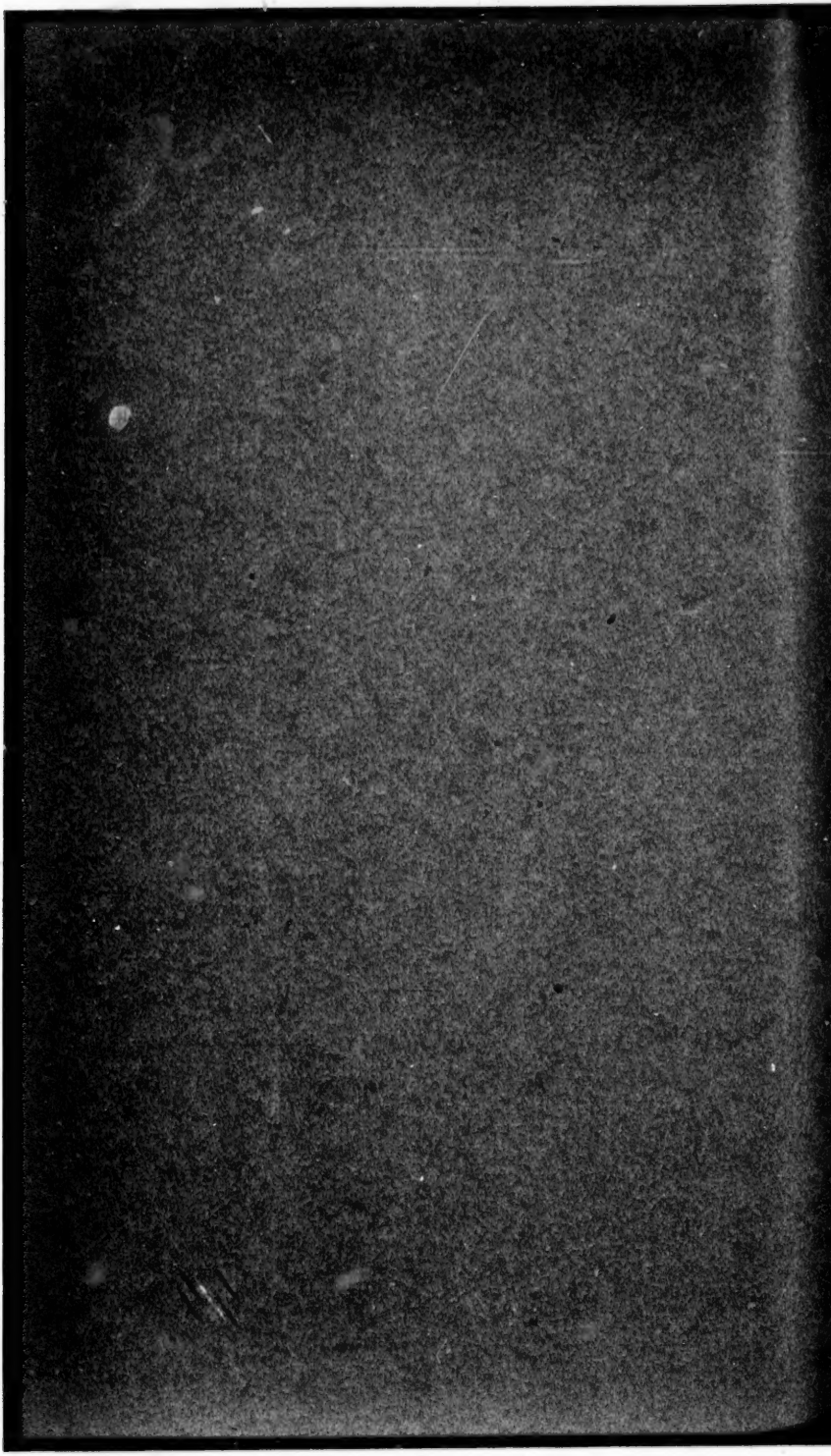

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1907.

NO. 235.

HONOLULU RAPID TRANSIT & LAND COMPANY, Appellant, vs. JAMES L. HOLT, Assessor, Appellee.	APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This is an appeal from a decision of the Supreme Court of Hawaii, rendered October 17th, 1906, sustaining the decision of the Tax Appeal Court of the First Taxation Division of the Territory of Hawaii, fixing the assessment upon the combined property of appellant as an enterprise for profit at the sum of one million three hundred and sixty thousand dollars ($1,360,000.00). In accordance with the requirements of the laws of Hawaii appellant made a return of its property for taxation for the year 1906 showing the various items of its property and valuing them as a whole at the sum of seven hundred and fifty-

two thousand nine hundred and seventy-two dollars and fifty-eight cents ($752,972.58), and claiming an exemption of eight thousand nine hundred and thirty dollars and eighty-one cents ($8,930.81), thus leaving a net sum of seven hundred and forty-four thousand and forty-one dollars and seventy-seven cents ($744,041.77) subject to taxation. No return, however, of the aggregate value of its combined property as an enterprise for profit was made. (Tr. pp. 2-8.) The tax assessor, appellee herein, made an assessment upon the combined property of appellant pursuant to Section 1216 of the Revised Laws of Hawaii as amended by Act 88, Session Laws 1905, it being a corporation holding a public utility franchise and occupying the public streets or highways of the Territory, and placed upon such combined property a valuation of one million eight hundred and thirty-one thousand dollars ($1,831,000.00). This valuation was arrived at in pursuance to the provisions of the statute above referred to by taking the par value of the stock and bonds issued by appellant less the exemption allowed by law, in this case the sum of eight thousand nine hundred and thirty dollars and eight-one cents ($8,930.81), the sum claimed by appellant. (Tr. p. 2.) Notices of the increase in the valuation of the property were sent to appellant (Tr. pp. 9 and 10) and from this increase in valuation appellant took an appeal to the Tax Appeal Court of the First Taxation Division of the Territory (Tr. pp. 11 and 12). This Court, after hearing evidence, placed the valuation of the property of appellant as an enterprise for profit at the sum of one million three hundred and sixty thousand dollars ($1,360,000.00), in arriving at such total, considering among other items the value of the franchise of appellant for taxation purposes. (Tr. pp. 13-15.) Both appellee and appellant thereupon took an appeal to the Supreme Court of Hawaii (Tr. pp. 15-17), which thereafter, as already stated, sustained the decision of the Tax Appeal Court (Tr. pp. 22-24). Thereafter and on December 1st, 1906, an appeal to this Court was taken and allowed. (Tr. pp. 25-29).

For a more complete understanding of the case appellee calls attention also to the following facts, which although not shown directly by the transcript herein are all matters of record to which, by implication at least, reference is made in the transcript.

Appellant is a corporation organized under the laws of Hawaii for the purpose of taking over, and it has taken over, a certain street railway franchise granted to certain persons by Act 69 of the Session Laws of 1898 (now Chapter 66 of the R. L. of Hawaii), under which it is now operating such railway. This Act was passed by the Legislature of the Republic of Hawaii on July 6th, 1898, and became law by the approval of the President of the Republic of Hawaii on July 7th, 1898. The joint resolution of Congress annexing the Republic of Hawaii to the United States of America was passed and received the approval of the President of the United States on July 7th, 1898, although notice of such fact was not received in Hawaii until a later date. On the 25th day of June, 1900, the President of the United States approved and ratified the granting of the franchise referred to. No question is raised as to the validity of the franchise, but appellant claims that by reason of the necessity and the fact of its ratification by the President of the United States, the franchise became one granted by Federal authority.

Two questions are presented by appellant in its six assignments of error. They may be stated as follows:

I.

THE SUPREME COURT OF HAWAII ERRED IN HOLDING THE FRANCHISE OF APPELLANT SUBJECT TO TAXATION BECAUSE,

(a) The franchise is a Federal grant and not subject to taxation by the Territory, and

(b) The franchise in its terms grants immunity from taxation thereupon to its holder.

II.

THE SUPREME COURT OF HAWAII ERRED IN SUSTAINING THE ASSESSMENT AGAINST APPELLANT OF ANY AMOUNT IN EXCESS OF THE SUM OF $750,512.77 AND IN HOLDING THAT APPELLANT COULD BE TAXED ON ANY SUM GREATER THAN THE TOTAL OF THE ASSESSMENT ON THE INDIVIDUAL ITEMS SPECIFIED IN THE NOTICE GIVEN TO APPELLANT OF AN INCREASE IN THE ASSESSMENT.

These questions will be considered in the order stated.

ARGUMENT.

I.

THE SUPREME COURT OF HAWAII DID NOT ERR IN HOLDING THE FRANCHISE OF APPELLANT SUBJECT TO TAXATION AS A PART OF THE COMBINED PROPERTY OF APPELLANT.

(a) IT IS NOT A FEDERAL FRANCHISE AND EVEN IF IT WERE IT WOULD BE SUBJECT TO LOCAL TAXATION.

Appellant's claim, that the franchise is a Federal franchise, is based solely upon the approval of the act of the legislature of the Republic of Hawaii granting the franchise (Chapters 69 and 70, Laws 1898, now Chapter 66 R. L. of Haw.), by the President of the United States under the authority vested in him by Section 73 of the act to provide a government for the Territory of Hawaii (31 Stat. at L. 141). The effect of such approval amounts to no more than a prior authorization. It was a ratification only of an act of the Republic of Hawaii and was not intended to, nor did it, confer a special grant from Congress itself.

In *Miners' Bank v. State of Iowa*, 12 How. 1, a very similar question to that now before the court was presented. In this case it was claimed that the effect of congressional approval given to the charter of the Bank of Dubuque, which had been granted by the legislature of the Territory of Wisconsin, was to make such charter, in nature, a federal charter. In considering this question the court held, at page 7:

> "It has been argued in this case, that as Congress, in creating the territorial governments of Wisconsin and Iowa, reserved to themselves the power of disapproving and thereby annulling the acts of those governments, and had, in the exercise of that power, stricken out several of the provisions of the charter of the Bank or Dubuque, enacted by the Legislature of Wisconsin, assenting to the residue; that therefore the charter of this Bank should be regarded as an act of Congress, rather than of the territorial government; and consequently the decision of the state court, in favor of the repealing law of Iowa, must be held to be one in which was drawn in question and overruled the validity of a statute of or an authority exercised under the United States, and as a decision also against a right, title, or privilege set up under a statute of the United States. The fallacy of this argument is easily detected. Congress, in creating the territorial governments, and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from those powers, until expressly sanctioned by themselves, whilst for considerations equally strong they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental. * * *
>
> "The argument would render also the acts of the territorial governments, even the most wholesome and

> necessary, and though indispensably carried to the extreme of authority, obnoxious to the charge of usurpation or criminality. The reverse of this argument, whilst it is accordant with the investiture of general legislative power in the territorial governments, places them in the position of usefulness and advantage towards those they were bound to foster, and subjects them at the same time to proper restraints from their superior. The charter of the Bank of Dubuque enacted in all its details and powers ever possessed by it, (and according to which it was in fact organized), by the Legislature of Wisconsin, must be looked upon as the creature of that legislature."

See also *Lyons v. Wood*, 153 U. S. 661;
U. S. v. Church, 5 Utah 373 (15 Pac. 479);
Atl. & Pac. Ry. v. Lesueur, 1 L. R. A. 244.

(b) THE TERMS OF THE FRANCHISE ITSELF GRANT NO IMMUNITY FROM TAXATION NOR IS IT EXEMPT UNDER THE GENERAL LAWS OF HAWAII.

Section 30 of the Franchise Act (Chap. 69, Laws 1898, as amended by Sec. 865, R. L.) provides:

> "The property of the said association and others shall not be liable to internal taxation while said railway is under construction, provided that as fast as completed and equipped the completed and equipped portions shall become liable to such taxation."

Appellant also relies upon Section 17 of the Franchise Act, now Section 851 of the Revised Laws. This Section provides:

> "Sec. 851. Charges on Income. The following charges shall be lawful upon the income of said railway:
>
> 1. The expense of operating, repairs, renewals, extensions, interest, and every other cost and charge

properly or necessarily connected with the maintenance and operation of said railway;

2. Dividends may be paid to the stockholders not to exceed eight per cent. on the par value of the stock issued;

3. A sinking fund may be created for the redemption of any bond which may be issued or other record debt and the capital upon the expiration of the franchise; provided, however, that the amount placed to the credit of such sinking fund annually shall not exceed in amount such a sum, with interest computed at five per cent. per annum, compounded, as will, principal and interest combined, at maturity, equal the par value of the bonds, record and capital debt aforesaid;

4. The excess of income shall be divided equally between the Territory of Hawaii and the stockholders of said corporation;

5. A quarterly account or trial balance of the corporation shall be rendered by the corporation to the superintendent of public works from the beginning of the actual construction of the railway."

Appellee submits that under neither of the foregoing sections can an exemption of any portion of the property of appellant be claimed except while the railway is under construction and that the foregoing provisions distinctly show an intent to hold such property liable to taxation to the extent and as soon as it became a completed and equipped portion of such railway. Considering the Franchise Act as a contract, appellee claims that such were the agreements entered into. The general taxation laws of Hawaii give no exemption such as that claimed. Expressly included within the term "personal property," within the meaning of the taxation statutes of Hawaii, are franchises.

Section 14 of Chapter 51 of the Laws of 1896, now Section 1212 of the Revised Laws, provides as follows:

"Sec. 1212. PROPERTY TAX. Except as otherwise provided, all real property and all personal property within the Territory shall be subject to an annual tax of one per cent. upon the full cash value of the same."

Section 16 of Chapter 51 of the Laws of 1896, now Section 1215, Revised Laws, in defining "personal property," provides:

"The term 'personal property' for the purposes of this chapter shall mean and include all * * * franchises * * * not exempted by law from taxation. * * *."

Section 17 of Chapter 51 of the Laws of 1896, now Section 1216 of the Revised Laws, provides:

"Sec. 1216. BASIS OF VALUE FOR TAXATION. All real and personal property and the interest of any person in any real or personal property shall be assessed separately as to each item thereof for its full cash value.

"Provided, however, that in all cases where real and personal property or several classes or kinds or parcels of real or personal property respectively, are combined and made the basis of an enterprise for profit, the combined property forming such basis of such enterprise for profit, shall be assessed as a whole on its fair and reasonable aggregate value.

"Provided also, that the combined property of every corporation holding a public utility franchise and occupying the public streets or highways of the Territory, other than any such corporation that by the terms of its franchise is required to pay a percentage of its gross income to the Territory, shall be valued and assessed at not less than the total amount of the par value of the capital issues emitted by such corporation.

"In estimating the aggregate value of each such en-

terprise for profit, there shall be taken into consideration the net profits made by the same, also the gross receipts and actual running expenses; and where it is a company being a corporation whose stock is quoted in the market, the market price thereof, as well as all other facts and considerations which reasonably and fairly bear upon such valuation.

"In ascertaining the aggregate value of the property constituting the basis of an enterprise for profit for the purpose indicated by this Section, there shall first be included all property combined and forming the basis of such enterprise whether within the definition of real or personal property set forth in this chapter or not, and there then shall be deducted therefrom the value of shares in other Hawaiian corporations, held or owned by such enterprise, the value of all property on which specific taxes are levied and the value of all property that would not be taxable if not so combined and made the basis of an enterprise for profit.

"And further provided, that when any real estate or house is leased or rented, the sum of eight years' rental thereof shall be the assessment value of such real estate or house, unless such valuation shall be manifestly unfair or unjust."

Within the meaning of the Sections above quoted the franchise of appellant was properly considered a part of its property and taxable in connection with the other property of appellant as combined property forming the basis of an enterprise for profit, since the franchise, of necessity, was subject to all general laws in force at the time it was granted, unless a contrary intent is clearly expressed.

Theological Seminary v. Ill., 188 U. S. 662-672;

New Orleans City & Lake Ry. v. New Orleans, 143 U. S. 192;

Memphis Gaslight Co. v. Shelby Co., 109 U. S. 398;
Chicago B. K. C. R. v. Guffey, 120 U. S. 569;
Atl. & Pac. Ry. Co. v. Lesueur, 1 L. R. A. 244;
Vicksburg Ry. Co. v. Dennis, 116 U. S. 665-668;
Bank of Commerce vs. Tenn., 161 U. S. 134-146;
Ford v. Delta & Pine Land Co., 164 U. S. 662-666;
Hoge v. R. R. Co., 99 U. S. 348-355.

As a general rule the franchise, capital stock, business and profits of all corporations are liable to taxation in the place where they do business and by the state which creates them, and any exemption from such taxation must be given in clear terms.

Central Pac. Ry. v. Cal., 162 U. S. 91-126;
State Ry. Tax Cases, 92 U. S. 575-603;
State Freight Tax Cases, 15 Wall. 232;
Society for Savings v. Coite, 6 Wall. 607;
Thompson v. Pac. Ry. Co., 9 Wall. 579-590;
Henderson Bridge Co. v. Ky., 166 U. S. 150;
Atl. & Pac. R. R. Co. v. Lesueur, Supra.

Under the provisions of the act to provide a government for the Territory of Hawaii, 41 Stat. at L., 141, as is also the case under the other organic acts of the other territories, the power of taxation is general and restricted only by the constitution and laws of the United States.

Peacock v. Pratt, 121 Fed. Rep. 772, 776;
Talbott v. Bd. of Commissioners, 139 U. S. 438;
Atl. & Pac. Ry. v. Lesueur, Supra;
Silver Bow Mining Co. v. Davis, 6 Mont. 306.

(c) THE TAX ASSESSED AND IN CONTROVERSY HERE IS NOT UPON THE FRANCHISE OF APPELLANT AS SUCH BUT UPON THE COMBINED PROPERTY OF APPELLANT AS AN ENTERPRISE FOR PROFIT. (Tr. p. 24).

Sections 16 and 17 of Chapter 51 of the Laws of 1896, now

Sections 1215 and 1216 of the Revised Laws of Hawaii, which have been quoted above, require an assessment to be made upon the combined property of appellant forming the basis of an enterprise for profit, and expressly include within the term "property" the franchise held by appellant. The assessment made by the assessor (Tr. p. 8. List of Tax Payers, pp. 6 and 7), the decision of the Tax Appeal Court (Tr. pp. 13-15) and the decision and judgment of the Supreme Court of Hawaii (Tr. pp. 20-25) show only that in accordance with the requirements of the statutes above referred to, the franchise of appellant was included as a part of the property of appellant going to make up the combined property upon which the assessment was made. The claim cannot be sustained from the record in this case that any particular valuation was placed upon the franchise of appellant, or that any particular tax was assessed against such franchise. It was considered only, and it was necessary to consider it, as a part of appellant's property and therefore subject, with its other property, to taxation.

II.

THE SUPREME COURT OF HAWAII DID NOT ERR IN SUSTAINING THE ASSESSMENT AGAINST APPELLANT OF AN AMOUNT IN EXCESS OF THE SUM OF SEVEN HUNDRED AND FIFTY THOUSAND FIVE HUNDRED AND TWELVE DOLLARS AND SEVENTY-SEVEN CENTS ($750,512.77), NOR DID IT ERR IN HOLDING THAT APPELLANT COULD BE TAXED UPON SUMS GREATER THAN THE TOTAL OF THE INDIVIDUAL ITEMS SPECIFIED IN THE NOTICE TO APPELLANT OF A RAISE IN ITS ASSESSMENT.

In the absence of the evidence upon which the Tax Appeal Court and the Supreme Court of Hawaii based their decisions fixing the assessment of appellant at the sum of one million three hundred and sixty thousand dollars ($1,360,000.00), this Court cannot review such assessment.

Under these circumstances a finding of fact by the highest

court of a State, or by the Supreme Court of the Territory of Hawaii, will not be reviewed on appeal by this court.

Dower v. Richards, 151 U. S. 658, 663;
Israel v. Arthur, 152 U. S. 362;
In re Buchanan, 158 U. S. 26;
Grand Rapids & Indiana R. Co. v. Butler, 159 U. S. 61;
Bartlett v. Lockwood, 160 U. S. 368;
Central Pac. Railroad v. California, 162 U. S. 115;
Stanley v. Schwalby, 162 U. S. 278;
Noble v. Mitchell, 164 U. S. 373;
Egan v. Hart, 165 U. S. 189;
Hedrick v. Atchison, Topeka, etc., R. R., 167 U. S. 677;
Turner v. New York, 168 U. S. 95;
Rhodes v. Iowa, 170 U. S. 437;
Simonson v. Sinsheimer, 100 Fed. 429.

There was no error in fixing the assessment at a sum greater than the total amount of the items specified in the notice of a raise in assessment given appellant. Under the statutes of Hawaii above referred to, the only assessment which could be made against the appellant was upon its combined property. No return was made by appellant of the aggregate value of its combined property as an enterprise for profit (Tr. pp. 2-8). The notice of raise in assessment showed that the aggregate value of such combined property forming the basis of the business enterprise for profit known as the Honolulu Rapid Transit and Land Company was placed at one million eight hundred and thirty-one thousand dollars ($1,831,000.00). The specification, therefore, of other items in the notice of raise must be regarded as surplusage only.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

Dated Honolulu, February 28th, 1908.

CHARLES R. HEMENWAY,
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MASON F. PROSSER,
Attorneys for Appellee.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. 22.

HONOLULU RAPID TRANSIT AND LAND COMPANY, PLAINTIFF IN ERROR,

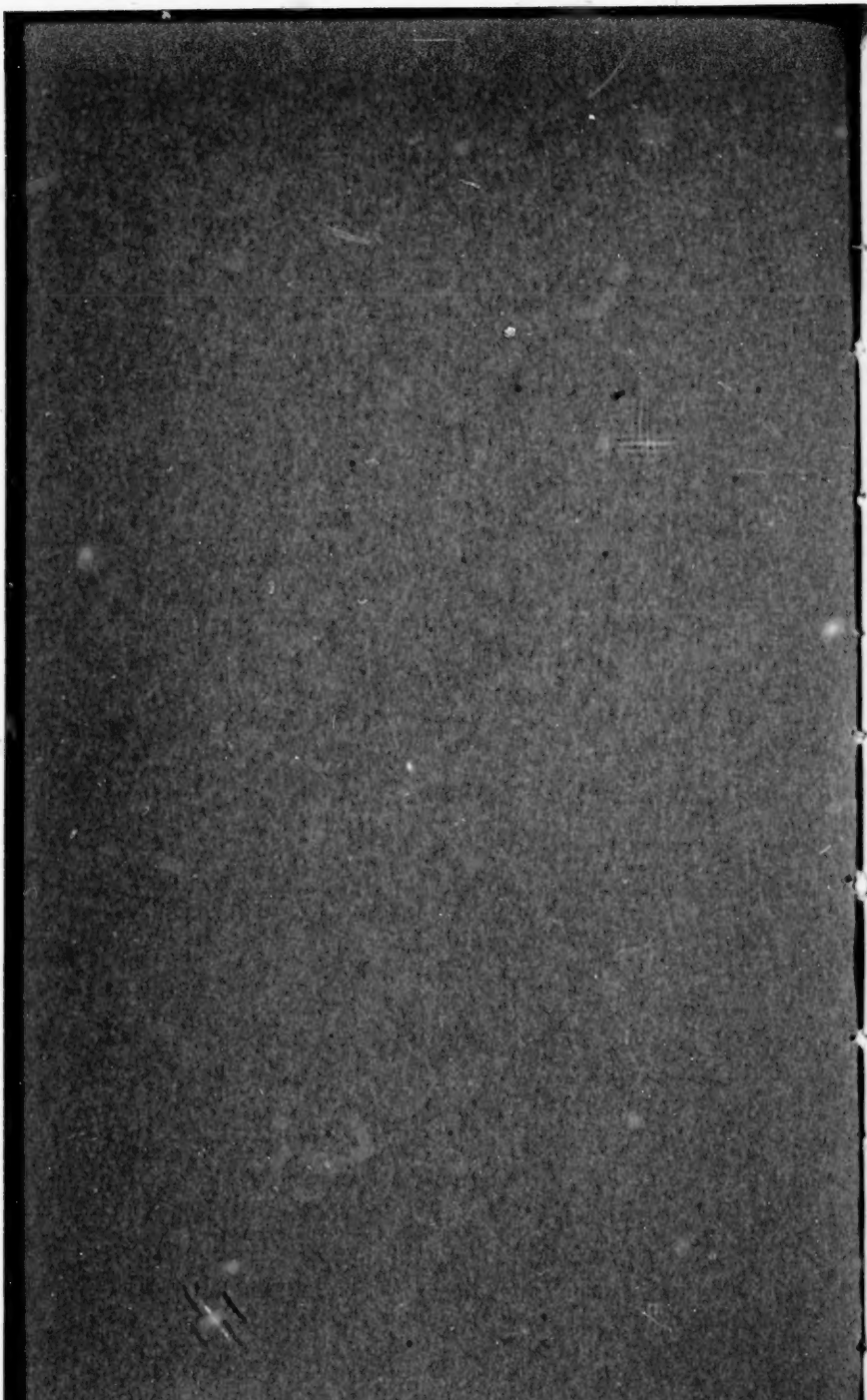
vs.

JAMES L. HOLT, ASSESSOR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED FEBRUARY 10, 1909.

(20,577.)



(20,577.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 234.

HONOLULU RAPID TRANSIT AND LAND COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES L. HOLT, ASSESSOR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 12, 1907.

1 TERRITORY OF HAWAII:

Section 1283 of the Revised Laws of Hawaii 1905 as amended by Act 87 of the Session Laws of 1905 reads as follows:

(SECTION 1283.) It shall be the duty of all persons of lawful age having an income of Five Hundred Dollars or more, for the first taxation period, and having an income of One Thousand Dollars or more for any taxation period thereafter, from all sources, and of all corporations made liable to income tax, to make and render a list or return between the first and thirty-first days of January of each year, in such form as the Treasurer of the Territory may direct, to the Assessor of the Division in which such persons or corporations reside, locate or do business of the amount of their or its income, gains and profits as aforesaid: and all guardians, trustees, executors, administrators, agents, receivers, and all corporations or persons acting in a fiduciary capacity, shall make or render a list or return as aforesaid to the Assessor of the Division in which such person or corporation, acting in a fiduciary capacity resides or does business of the amount of income, gains and profits of any minor or person for whom they act, and the Assessor shall require every list or return to be verified by the oath or affirmation of the person or authorized officer of the corporation making the same.

All taxes amounting to over $10.00 are payable in U. S. gold coin.

This form of Return for Income Tax approved:

A. J. CAMPBELL, *Treasurer.*

[Endorsed.]

S. C. No. 150. Filed Aug. 3, 1906.
(Sg.) J. A. THOMPSON, *Clerk.*

TERRITORY OF HAWAII:

Income Assessment List, 1906.

DISTRICT OF HONOLULU,
Island and County of Oahu:

Return of Honolulu Rapid Transit & Land Co.

Income Book 6, Page —.

Notice.

Pursuant to the provisions of Chapter 99, Revised Laws of Hawaii, 1905, as amended by Act 87 of the Session Laws of 1905, all persons and corporations are required to make and render a list or return between the first and thirty-first days of January, 1906, in such form as the Treasurer of the Territory may direct, to the Assessor of the

Division in which such persons or corporations resides, locate or do business.

Upon failure to make such return the Assessor may make such assessment as he may consider just and the same shall be binding and conclusive and shall not be subject to appeal.

Received January —, 1906.

____ ____,
Deputy Assessor and Collector.

Notice Mailed on Feb. 20, 1906.

I hereby certify that the within return is a true copy of the original on file in my office.

(Sg.) JAMES L. HOLT,
Assessor, 1st Division.

The Name of Each Person to Whom a Salary of More than Three Hundred Dollars Was Paid for the Six Months Ending December 31st, 1905, and the Actual Amount Paid to Such Person.

Name.	Amount.		Name.	Amount.	
.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....

2 This return shall be made by all persons having an income of five hundred dollars or more for the six months ending December 31st, 1905, and by all business corporations.

1906. INCOME TAX RETURN. 1906.

Statements Showing the Gains, Profits, and Income of Honolulu Rapid Transit & Land Co., District of Honolulu, Island and County of Oahu, During the 6 Months Preceding January 1st, 1906.

Return to be made to the Assessor of the Tax Division in which the person or corporation resides, locate- or do- business between the first and thirty-first days of January, 1906. The taxes on income shall be due and payable on the first day of January following of each year: and all such taxes remaining unpaid on the 15th day of May shall thereby and thereupon become delinquent as to one-half of the amount due, and the balance of the taxes remaining unpaid on the 15th day of November shall thereby and thereupon become delinquent.

SCHEDULE "A"—GROSS INCOME.

How derived.	Amount.
(1) Interest upon Bonds.....	$
(Insert under this heading all interest received from bonds of every kind or nature.)	
(2) Interest upon Notes and other securities actually received (not including Interest on Bonds).....	110 23
(3) Sales of movable property of every description.....	
(Insert under this heading gross sales of all merchandise, corporation stocks, bonds, notes and all other classes of movable property.)	
Railroad Material..... 2331.85	
Rock Crusher..... 1700.00	
	4031 85
(4) Sale of Real Estate including leaseholds purchased within two years.....	
(Insert under this heading gross amount of sales of any real estate or leaseholds which you purchased since December 31st, 1903.)	
.....	
(5) Dividends on Corporation stock	
(Insert under this heading all dividends received from corporations.)	
(6) Money and the value of other personal property acquired by gift or inheritance.....	
(This item should include money and the value of all personal property acquired by gift or inheritance, and amounts received from life and accident insurance.)	
.....	
(7) Compensation from insurance.....	
(Insert under this heading all amounts received from Insurance Companies on account of losses. Also amounts received on account of matured, surrender and accident policies, except as included in item 6 above.)	
.....	
(8) Salaries, fees, and other compensation for services (Professional or otherwise).....	
(9) Amounts paid or payable, distributed or distributable to shareholders from any fund or account..	
(This item applies to corporations and is to be stated unless covered by one of the previous items.)	
(10) Amounts carried to the account of any fund or used for construction or enlargement of plant, and other expenditures or investments paid from net annual profits.....	7437 31
(This item applies to corporations and is to be stated unless covered by one of the previous items.)	

(11) Gross rentals..... (Insert under this heading gross rentals received from every description of property.)			2139 75
(12) All other income received from any source..... (Insert under this heading income from all sources not above enumerated (Specifying same.)			
Earnings from operations of cars.....	161780.19		
Aquarium Receipts.....	1008.05		
Miscellaneous.....	226.75		
	163014.99		
Total.....	7437.31		$169296 82

3 SCHEDULE "B"—DEDUCTIONS AND EXEMPTIONS.

Nature.		Amount.
(1) Interest on Government Bonds..... (Insert under this heading only the amount received on such Government Bonds as you have returned in item 1 of Schedule "A.")		$
Bond Interest due Nov. 1st, '05.....	20700.	
Interest on notes.....	153.48	
		20853 48
(2) Interest on Existing Indebtedness..... (Insert under this heading only the actual amount of interest you have paid out during the six months ending December 31st, 1905.)		
(3) Amounts expended in the purchase of production of movable property mentioned in Schedule "A." (Insert under this heading only the actual amount expended in the purchase or production of the movable property which you sold during the six months ending December 31, 1905 and returned under item 3 of Schedule "A.")		4031 85
.....		
.....		
(4) Amounts expended in the purchase of real estate including leaseholds mentioned in Schedule "A." (Insert under this heading the purchase price of any real estate or leasehold interests which you have returned in item 4 of Schedule "A.")		
.....		
(5) Dividends on corporation stocks received from Corporations which have been assessed upon their net profits the tax of Two Per Cent..... (Insert under this heading dividends received from corporations which have been assessed under this Act.)		
.....		

(6) Bequests and inheritance otherwise taxed as such.. (From what estate received and when taxed and under what Law?)		
.....		
(7) Actual losses arising from Fire..... (Insert under this heading the actual loss or losses you sustained during the six months ending December 31st, 1905 on account of fire. Not compensated for by insurance or otherwise.)		
.....		
(7a) Amounts paid as premiums on policy or policies returned under Item Seven of Schedule "A"....		
(8) Actual losses incurred in trade..... (Insert under this heading only the actual losses you have sustained in trade.)		
.....		
(9) Losses otherwise actually incurred..... (Insert under this heading any losses you have actually sustained which cannot be properly inserted under any of the previous items.)		
Written off Dec. 31, '05 as depreciation in year 1905.	40935 43	
(10) Necessary expenses actually incurred in carrying on business, trade, profession or occupation, or in managing the property (as the case may be)..	100068 69	
.....		
(11) Taxes and license fees paid by the Government... Property Tax $13515. Income Tax $1412.22. Poll Tax $6.00. License $—..... (Water and Sewer rates not deductable under this Act. When strictly business expenses they may be returned under item 10 of Schedule "B.")	14933 22	
(12) Exemption of Income of $500.....		
Total.....		$180822 67

Summary.

Gross income as per Schedule "A".....	$169296 82
Deductions and exemptions as per Schedule "B".....	180822 67
Net income.....	
Amount of tax at two per cent.....	

4 SCHEDULE "C"—SPECIAL EXHIBIT OF CORPORATIONS.

Gross Receipts from sales made at home and abroad and from all kinds of business of any name or nature.....		$169296.82
Expense, exclusive of interest, annuities, dividends and permanent improvements..	$180822.67	
Amount paid on account of interest, annuities and dividends, stated separately.		
Interest.....	20853.48	
Annuities.....		
Dividends.....	26500.00	
Amount expended on improvements.....		7437.31

The person making the foregoing return is requested to answer the following questions, namely:

Question 1. Had your wife, or any minor child or children of yours, any independent income during the six months ending December 31st, 1905?

Answer 1. ——.

Question 2. Have you included such income or incomes in this return? If not has such income been returned and by whom?

Answer 2. ——.

Question 3. Have you kept books of account?

Answer 3. Yes.

Question 4. Is your income herein estimated, or taken from your books?

Answer 4. Taken from books.

Question 5. What are the particular items of "Losses" set forth by you opposite paragraphs 7, 8 and 9 of "Deductions" and when did each occur?

Answer 5. "9 Sch. B" Consists of depreciation by reason of climatic & other conditions of wear & tear.

Question 6. What is your occupation?

Answer 6. ——.

Question 7. How did you determine that debts returned by you as a loss are uncollectable?

Answer 7. ——.

Question 8. Has the Corporation for which this return is made, kept full, regular, and accurate books of accounts; upon which all its transactions were entered from day to day for the full period covered by this return?

Answer 8. Yes except as to depreciation which was determined at end of year.

Question 9. Is this return made exclusively from said books?

Answer 9. Yes.

Question 10. Have the full amounts set forth in this return as salaries of officers and pay to employés been actually paid within the six months covered by this return to *bona fide* officers and employés of this corporation for services actually rendered?

Answer 10. Yes.

Question 11. What were the "Necessary Expenses" and the amount of each class, included in the amount set opposite Paragraph 10 of "Deductions"?

Answer 11. Expenses of operation & maintenance.

This Oath for Officer of Corporation, Agent, Administrators, Executors, Trustees, etc.

TERRITORY OF HAWAII, *Island and County of Oahu, ss:*

C. G. Ballentyne being first duly sworn deposes and says: That he is manager of the Honolulu Rapid Transit & Land Co. that he has read the foregoing return by him subscribed for and on behalf of said Company and knows the contents thereof; that the same is

a true, full and complete return, and that the facts therein set forth are true to the best of his knowledge and belief.

(Signed) C. G. BALLENTYNE.

Subscribed and sworn to before me this — day of January, A. D. 1906.

—— ——,

Deputy Assessor and Collector.

This Oath for Individuals.

TERRITORY OF HAWAII, *Island and County of Oahu*, ss:

—— —— being first duly sworn deposes and says: That he has read the foregoing return by him subscribed and knows the contents thereof; that the same is a true, full and complete return, and that the facts therein set forth are true to the best of his knowledge and belief.

—— ——,

Address —— ——.

Subscribed and sworn to before me this — day of January A. D. 1906.

—— ——,

Deputy Assessor and Collector.

5 First Division, Honolulu District.

This is to certify that Honolulu Rapid Transit & Land Co. of this district is assessed for the year 190–, as follows:

	Am't returned.	Am't assessed.
Aggregate value, business enterprise.....		
Real Estate Gross Income.....	169,296.82	169,296.82
Personal Property Deductions &c.....	180,822.67	139,887.24
Dogs Net Income.....	.....	29,409.58
Bicycles 2% tax.....	.....	588.20
Automobiles.....		
Brakes and Sulkies.....		
Ox-carts.....		
Other Vehicles.....		
Poll, Road and School.....		
Total.....		

That he disputes the following items of such assessment, to-wit:

	Am't appealed.	Am't tax.
Aggregate value, business enterprise.....		
Real Estate.....		
Personal Property.....		
Dogs.....		
Bicycles.....		
Automobiles.....		
Brakes and Sulkies.....		
Ox-carts.....		
Other Vehicles.....		
Poll, Road and School.....		
Total amount disputed.....		

And has duly appealed from such assessment.

That I have received on deposit the sum of $59.00 for the cost of this appeal.

Dated May 12, 1906.

(Sg.) JAMES L. HOLT, *Assessor.*

[Endorsed:] S. C. No. 150. Filed July 26/06. (Sg.) J. A. Thompson clerk.

6 Honolulu Rapid Transit and Land Company.

Statement Showing the Percentage and Value of Wear and Tear in Use of the Plant of the H. R. T. & L. Co. for the Year Ending December 31st, 1905.

Item.	Book value.	Per cent.	Amount.
Power Plant.....	$146,495.20	5	$7,324.76
Buildings.....	125,319.39	2½	3,132.98
Tracks (Tangent).....	515,257.00	4	21,910.28
" (Curves and specials).....	96,221.82	8	7,697.74
Overhead Structure.....	76,786.97	8	6,142.95
Cars, Trucks and Motors.....	211,155.91	5	10,557.99
Equipment, Tools and Supplies.....	11,612.41	10	1,161.24
			$57,827.74
Total for the half year ending Dec. 31, 1905.....			$28,913.87

[Endorsed:] S. C. No. 150. Filed July 26, 1906. (Signed) J. A. Thompson, clerk.

7 Tax Appeal Court for the First Division, Island of Oahu, Territory of Hawaii.

HONOLULU RAPID TRANSIT AND LAND COMPANY, a Corporation,
vs.
JAMES L. HOLT, Tax Assessor.

Notice of Appeal.

Now comes Honolulu Rapid Transit and Land Company, a Corporation, by its Attorneys Castle and Withington, and appeals from the assessment of its income tax as follows:

Income for Six Months Preceding January 1, 1906.

	As returned.	As changed by assessor.
Gross Income	169,296.82	169,296.82
Deductions and Exemptions	180,822.67	139,887.24
Net Income	Nothing	29,409.58
Tax at 2%	Nothing	588.20

the amount appealed from being the said net income of $29,409.58, and the amount of tax $588.20, on the ground that said assessment is illegal, excessive, and erroneous, and that the appellant has no net income liable to taxation.

HONOLULU RAPID TRANSIT
AND LAND COMPANY,
By CASTLE & WITHINGTON,
Its Attorneys.

James L. Holt, Esq., tax assessor:

Please take notice that Honolulu Rapid Transit and Land Company has appealed from the assessment to its income as above.

HONOLULU RAPID TRANSIT
AND LAND COMPANY,
By CASTLE & WITHINGTON,
Its Attorneys.

8 [Endorsed:] Tax Appeal Court for the First Division, Island of Oahu, Territory of Hawaii. Honolulu Rapid Transit & Land Company, a corporation, *vs.* James L. Holt, Tax Assessor. Notice of Appeal. S. C. No. 150. Filed July 26/06. (Sg.) J. A. Thompson, clerk. Castle & Withington, Attorneys for H. R. T. & L. Co.

9 *Transcript of Testimony.*

10 Before the Tax Appeal Court of the First Judicial Circuit, Territory of Hawaii.

Appeal No. —.

HONOLULU RAPID TRANSIT & LAND COMPANY, Appellant,
vs.
JAMES HOLT, TAX ASSESSOR, FIRST DIVISION, Appellee.

SATURDAY, *July 14th*, 1906.

Morning Session.

Present: T. F. Lansing, Esq., Chairman, J. K. Brown, Esq., and W. L. Brown, Esq.
D. L. Withington, Esq., for Appellant.
M. F. Prosser, Esq., for Appellee.

By Mr. PROSSER: The Court understands that I make the same objection to the appeal and notice, to dismiss the appeal.
Motion denied.

11 By Mr. WITHINGTON: I wish to offer the Tax return and notice of appeal which has been already objected to, and the certificate of deposit, and ask to have them marked as exhibits on behalf of Appellant.
(Received in evidence and marked "Appellant's exhibits A, B, and C.")
We have appealed from the entire tax and on the ground that the Territory has no right to tax our income anyway, and on the further ground, on which we offer evidence, that there is no net income to tax under the law. The assessment will show—the way the Assessor has arrived at it is by deducting one item and assessing us on twenty-nine——
By Mr. PROSSER: If the Court please, there is no question as between the parties here as to the gross income, none whatever. The gross income is admitted to be $169,296.82; that appears by their return and we accept that. The Appellant claims deductions and exemptions as per Schedule B of $180,822.67. In other words, they claim that their expenses have been greater than their income for the period. The Tax Assessor claims that their expenses during that period which are chargeable against income, $139,887.24, leaving a net income of $29,409.58 upon which a tax is due and payable at the rate of two per cent., making $588.20.
By Mr. WITHINGTON: Well, I will add to that interest on Government Bonds; no, interest on Bonds, $20,853.48; amount expended in the purchase or production of movable property, $4,031.85; Necessary expenses actually incurred, $100,068.69; Taxes
12 and License fees paid the Government—no License fees—Taxes paid the Government, $14,933.22. Those items are admitted, I understand.

By Mr. LANSING to Mr. Withington:

Q. Then the dispute is on what item?
A. The dispute is on item 9.

By Mr. PROSSER: On item 9 and also on the question as to whether the items which go to make up in item 10, the sum of $100,068.69 are all properly chargeable against Income.
By Mr. WITHINGTON to Mr. Prosser: You have allowed all that.
By Mr. PROSSER: Not that I know of.
By Mr. WITHINGTON: You have to allow it to make up the total that you give.

By Mr. LANSING:

Q. What is the item?
By Mr. WITHINGTON: Written off December 31st, 1905, depreciation in the year 1905, $40,935.43. That is the item which is not allowed.
By Mr. PROSSER: That is correct.
By Mr. WITHINGTON: I don't want you to understand that comprises our claim; we claim that the law allows us many other items which this return does not provide for any return at all.

L. T. PECK, called for appellant, sworn.

By Mr. WITHINGTON:

Q. You are President and have been for a number of years
13 of the Honolulu Rapid Transit & Land Company?
A. Yes.
Q. And you are of course as such President familiar with the system and with the business of the Honolulu Rapid Transit & Land Company?
A. The By-Laws require me to be.
Q. I wish to ask you whether a sinking fund has been created for the redemption of the Bonds?
A. Yes, Sir, it has been created in the sense that it has been started.

(There being no objection the Court here resumed the hearing of the appeal of James B. Castle, Mr. Castle appearing before the Court.)

Continued direct examination of L. T. PECK.

By Mr. WITHINGTON:

Q. What is that?
A. Deposits which have been made in the sinking fund, $3448.12 has been deposited in money in the sinking fund up to date from the incorporation of the Company and in addition to that six bonds have been handed back to the Trustee which had not been sold but which had been in the possession of the Company and were handed back to the Trustee and cancelled, or with the request to be cancelled, but whether they have been cancelled, we don't know.

Q. What is the amount of those?
A. Six thousand par value.

By Mr. LANSING:

Q. That has been included in your bonded indebtedness?

A. No, we never regarded that as our outstanding bonded
14 indebtedness, simply they were in the possession of the Company.

By Mr. W. BROWN:

Q. Required no transfer of bonds?
A. No, our outstanding bond was $690,000. and remain as such.

By Mr. WITHINGTON:

Q. But the improvements which they represented have been paid for out of Income?
A. Yes.
Q. Now what are the requirements in the future of that sinking fund?

By Mr. PROSSER: Objection, on the ground that it is incompetent, irrelevant and immaterial, and that no deductions can be made except for the period covered by the return, and on the ground that the obligation to pay your deposit money in the future is not before the Court.

By Mr. WITHINGTON: I am relying upon the law, but I want to show what the requirements of the bond fund are first, and how those requirements are distributed over the whole period.

By Mr. PROSSER to Mr. Withington:

Q. For the purpose of saving time, do I understand all your evidence is confined to this item of $40,935.43?
A. No, I am relying also on Section 17 of the Act of Incorporation.

Objection over-ruled.

By Mr. PROSSER: I understand this, that the evidence is
15 going to show that this sum is a part of the $40,000. returned.

A. (by witness): As between us and the tax authority, I would say so, but as between us and the stockholders, eventually of course any sum which we may charge off for depreciation would not be an asset as it would be if it had been put in the bank as a special investment. Depreciation if it is treated here it is for the purpose of having it as a deduction. The requirements for the year 1906 are $5426.85; the requirements for the year 1907——

By Mr. PROSSER: Same objection, on the ground of immateriality.

A. (by witness): Now in order to show the justification for this as an offset in the taxation return, because that is the whole contention now, it is not a question of what is on our books, it is a

question of what are our offsets of our gross income to the income tax—is that not so?

By Mr. PROSSER:

Q. It is simply a question as to whether this item of sinking fund is properly chargeable as depreciation?

A. Yes; I simply want to spurn this imputation that anything that goes on our books shall be taxed as it goes on the books. For instance, we have an item of $500,000. as a value for the franchise, not as dollar for dollar, but as a valuation against a certain amount of issue of shares, so that I deny the right to assess our franchise at $500,000. on the ground of our book entry, and that has simply already gone in; and this is a parallel; we have not put in any entry as sinking fund covering this $40,000., and in order to get at what our rights are I allow no deduction. The Legislature gave us
this franchise. We put in a certain amount of capital which
16 we took from our shareholders; we add to it contributions
from the bondholders and we build a railroad with it. The whole idea of the Legislature is that we shall at the end of the franchise period, we shall have such a right to deduct from our gross income from year to year as we may be able to provide. There is enough income to do it after paying our necessary expenses, enough so that at the end of the period we shall have a reserve fund to wipe out our capital and our bonded debt, and together with the value of the junk that is left so that we will get our investment back, and have in the meantime an income on our investment which shall not exceed 8% on the cost plus 25% added thereto, plus 50% of the expense. Now that is the whole proposition.

Q. Did I understand you to say you had issued these shares against the franchise?

A. No, sir.

Q. What did you say?

A. Now then, when it comes to deduction from our gross income we have two laws which affect us. We have the Income Tax law and the law known as the Rapid Transit Franchise law, Chapter 69 of the laws of '98. Now we propose in our contention with the Government to make such deductions from our gross income as the law allows us to make. In making this return we found no place there whatsoever for sinking fund deduction; neither did we find a line which would allow us to put other deductions otherwise than those enumerated above. The only thing we found there was an item which said—"Losses otherwise actually incurred." Now then, what is depreciation but a loss of capital, more or less tangible and hard to put your finger on, but which you know is
there because at the end of the time you have a handful of
17 junk worth from 5¢ to 10¢ on the dollar on your investment.
All you need to look at is the outcome of the Pacific Heights and the Hawaiian Tramways Company to see what the tangible effects were worth even after a portion of the life of the franchise was gone. Now in this $40,000. we have charged off as depreciation, $40,935.43, it is charged in our books by items amounting

dollar for dollar and cent for cent to $40,935.43. We have made no charge in our books thus far for a capital sinking fund, not a dollar has been charged up, but as between us and the Government and between us and the tax gatherer we have the right to make that account, whether it is made on our books or claimed here before this Court. Mr. Prosser said that he contended that it was the right of the Government if they found any additional facts to throw aside the assessment that they made and go ahead *de novo*. I am speaking as a layman; but we have that right as between us and the Government, and how is it going to be taken away because our bookkeeper up on Alapai Street did not put it in expressly as capital sinking fund but depreciation; if we can show you to day that the sinking fund and the depreciation items there would cover the same theory, loss and diminishing of investment, it seems to me that is all this Court needs to know.

Now the Government says that when we come to this sinking fund it must be so small, mind you, that with interest compounded every year at 5% it will equal the investment at the end of the franchise. Well, now it is absolutely impossible for this Company to ever assume now that it can earn 5% bond interest from now for 24 years. Under the provisions of the Trust Deed of the bonds it is shown that the Trustee in San Francisco must only
18 invest in certain gilt edged securities. Can he get 5% every year net on that in San Francisco? Mr. Brown himself knows that the net return on gilt edged securities ranges from 3½% to 4½%, and 5% is about top-notch for what are considered gilt edged bonded securities. Now there is not anything in this law which stands out clearer than this, that it is the intent of the Legislature that the investment shall not be impaired, provided our dividends do not exceed those amounts, because the Legislature never intended to give us a short shrift of 30 years and have us die at the end of that time with our capital badly impaired, because the sinking fund was not generous enough and the value of the junk was not there. So we intended to take a sinking fund of 5% and as much more depreciation as we could show. Now as to the question, Mr. Prosser, I think, will tell you that the Supreme Court has practically decided, although my lawyer says they have not so decided, that you must only take out the depreciation which you have actually sustained by a sale or an alienation of your property during the period for which it is incorporated. Just see how fallacious it is when it comes to a man without capital; he has a house which he can pass down from generation to generation, to his heirs and assigns, but a short lease or franchise is just about like an attorney general's period of office for four years. This is a short shrift which we have and if we should leave all this depreciation that simply means this, that the line can only be realized when we throw up at the end of the thirty years. The Deed says in order to get this allowance in the Income Tax it must come out of the very period that this line—why the depreciation for 34 years on this property will amount in all probability to a mil-

lion dollars. How are you going to get a gross income in
19 any one year or five years or ten years of a million dollars
from which to deduct it after taking out operating expenses? You cannot do it; you have to take it out in a short shrifted lease like this year by year it is there. You can go out and take the bolts out of the rails and lift up the rails and weigh them and show they have depreciated; it is all there, actual depreciation made during this period and the period that has preceded us, and we cannot take it out at the end of the life of the franchise because there is no income there to take it from; it is the whole value of the plant at the end of that time. Therefore I say if Mr. Ballentyne—he has figured it up; the amount of sinking fund that would retire the capital at the rate of interest settled by the franchise is $28,-444.22. That is for one year, of which we have the legal right now, that is in that $40,000. Now then, the law also allows us to deduct such a sum which at 5% per annum compounded would wipe out $690,000. The agreement between us and the bondholders cuts no ice, it is the one between us and the Government.

By Mr. WITHINGTON:

Q. It is Sixteen thousand more in round numbers?

A. We can easily figure it because it is the proportion of Six Hundred and ninety to Eleven hundred and fifty.

By Mr. PROSSER: If the Court please, it seems to me that this question has two sides here; we are brought to face a proposition of a deduction claimed by the Rapid Transit Company of $40,935.43 written off December 31st, 1905 as depreciation in the year 1905. Now that item appears on your annual report and the only charges that we can meet here before this Court are the various items which
on their books are shown to make up that item of $40,000,
20 as it appears by their report.

(Prolonged discussion by counsel and the Court.)

By Mr. LANSING (to witness):

Q. You started in to make some figures here and you divided into two parts and I am not clear on those two parts?

A. They are these: The capital indebtedness is $1,150,000. It would require, if we started at this time with a 5% sinking fund, it would require an annual contribution from the income of $28,-444.22. Now for to start a sinking fund at the same time on a 5% basis to retire the $690,000. of bonded indebtedness would require a further reduction from the income of $17,066.46. Now there would be $45,510. per annum to come out of the net income as put down on our annual report, less the $3457. already charged up which should be deducted from that, and there would be $42,000. additional from that annual report to deduct from the income for the year 1905. Now the stockholders wanted dividends; we paid a dividends of 6% on the preferred and 4% last year on the common. How did we do it? We simply postponed the starting of that sinking fund, but as between us and the tax gatherer we have the legal right to deduct it from our gross income in order to put back into

the investment and into the capital account that portion which, if we did not put it back, would be utterly destroyed and lost.

By Mr. W. BROWN to Mr. WITHINGTON:

Q. That is the case then Mr. Withington?

A. Yes, now you have the case.

Q. Now you don't expect the Court to allow a greater depreciation than you have asked for?

A. Well, it is about Two Thousand.

21 By Mr. PROSSER (to witness):

Q. Mr. Peck, might I call your attention to Section 1281?

(Reads Section 1281 to witness.)

A. That is al- right, but the man has his capital and is simply adding to it, and he cannot expect to take from it and add to it. When the Legislature gave us the franchise it gave us the right to do that; but it is different from the man who owns a plantation or a horse, which goes to his heirs and assigns forever.

By Mr. LANSING: I say that the Rapid Transit Company ought to furnish us with a statement of how this amount of $40,000. is made up.

A. (by witness): We are perfectly willing to do that.

By Mr. WITHINGTON (to witness):

Q. Will you state the future requirements of the bonds?

A. I have already answered that.

Q. Now, Mr. Peck, can you state under the Act what the requirements of the sinking fund at 5%, figured at 5% from this time, on the bonds and the stock would be?

A. The requirements for the capital would be per annum, in even dollars, $28,444.22.

Q. That is per year?

A. Per annum; the requirements for the bond issue of $690,000. would be $17,066.46, a total of $45,510.68.

Q. And under the contract with the bondholders you have in your return—in your books you have——?

A. Charged up on our books thus far, $3448.12 and have deposited six bonds.

Q. Now, Mr. Peck, do you feel—can you state what the item of $40,935.43 represents?

22 A. I can.

Q. Will you do so?

A. That co-esists of 1½% deduction on the book value of our power plant, cost value of our power plant, amounting to $2197.42—that is depreciation during this period; that is for the year 1905. On other buildings, 1½% for the year, $1879.75; on our tracks for the year, 3½% or $22,451.73; on our overhead structure, 3½% or $2687.50; on our cars, trucks and motors, 5% or $10,557.79, and the equipment, poles and supplies, $1161.24, on the equipment, poles and supplies, 10%, or a total depreciation on the cost of $1,568,340.90 of $40,935.43, being an average depreciation of —%.

By Mr. PROSSER:

Q. I understand that according to your theory of charging against this depreciation, you charge two items which together make $45,510.46, one being composed of an item of $28,444. and another item of $17,566.46—they represent two sums of money which you accumulate yearly to eventually meet the amount of money you have put into the plant?

A. That is not quite correct.

Q. That represents sums which you yearly put in your sinking fund?

A. That is not correct; we have not put it in, but as against the tax gatherer we have the right to call an offset.

Q. It represents money that you should put in.

A. Something that sooner or later we have to put in.

Q. You have not put it in yet?

A. We have put in $3448.12.

Q. Will you tell me Mr. Peck why you charge up the total amount of this $45,510.46 which represents the amount which you
23 should put in for the year against the income for six months, and also why do you charge the entire amount of your depreciation for one year, as appears by the return, against the income of six months?

A. Because our depreciation is not written off semi-annually, it is written up annually. There was not anything in it for the first six months and it was all in our operating period of one year.

Q. This amount as appears on the return, $40,000., you put in as being the amount of depreciation for this year and you thought it would be the same for the succeeding years,—simply an estimate?

A. This last year only that is an estimate based—you say "simply," now that gives the color to the word "estimate" in order to put it under a bann; it is not simply in the nature of a guess; it is a scientific system.

Q. Then the depreciation for six months is not the same as one year is it—if you have $40,000. worth in one year you would have $20,000. in six months?

A. I have answered that by saying if we had written up our books semi-annually, half of it would have appeared, first and half in the last, but it is not written up, and therefore we make this statement in our return. Question 8, it says: (Reads) "Has the corporation for which this return is made, kept full, regular and accurate books of account," etc. Now if you are trying to get depreciation under a transaction, which I think you say the Supreme Court says must be covered by actual cash transaction, we cannot put this depreciation on daily or monthly, we put it on yearly. It has to be an
24 estimate and you have to receive it on an annual basis according to the experience of companies all over the world.

Q. You return your income for a period of six months, don't you, and that is all?

A. Yes.

Q. And against that you charge the total amount of money which

you would have to put into your sinking fund for a year, don't you—those two items?

A. We have not put in sinking fund down here as such; you are examining me now on the making up of this $40,000.

Q. No, it seems to me that only one-half of those sums can be charged to that account in any event—you have been testifying of yearly depreciation and yearly amounts in the sinking fund, and if that amount has to be charged up yearly it would seem to me that amount, that six months amount appearing would be half?

A. The answer to that is this: * * * we did not get any exemption for the first six months of the period, and would thereby lose what the Government has expressly said that we should adopt as an off-set against the Tax Assessor. We have had the right for the first six months but did not make a book entry of it, but we want to claim the exemption. The law says it was made from day to day, but we made it from the end of the year, and it is then that these matters come up for discussion, and to stop in the middle of the year and begin studying up this deduction and making calculations is a simply over-looked matter.

By Mr. LANSING:

Q. Your return for Interest on Bonds, Sale of movable property railroad material, rock crusher, etc., $7437.31, Gross Rentals,
25 etc., making a total of $169,296.82 is for the period of six months from July 1st to December 31st inclusive?

A. Yes.

Q. And the other deductions are made for the taxation period?

A. Yes, that is to say that these taxes are paid for twelve months, but they are actually paid during the six months. For instance, the interest on our bonds are during that period, and this $40,000, is stated on our return as being written off for the year 1905 at the end of the year, which is the only time when the matter would come up to us.

By Mr. PROSSER:

Q. Did you charge anything off against Income for depreciation last year?

A. For the year 1904?

Q. 1905?

A. This is for 1905.

Q. Yes, 1904, on the return previous to the ones now before the Court, the last return was June 30th, 1905, I believe?

A. The whole depreciation that we have written off since we started is $40,935.43, and that is the lawful depreciation, a fair estimated depreciation based on the progress of railroads throughout the world.

Q. Then that represents the depreciation for a period of time, and not during one year?

A. Well, for one year; percentages for one year.

Q. Did you make any charge for depreciation in the previous year?

A. No.

Q. Is it not a fact that you did make a charge for depreciation and it was allowed? On your return?

26 A. If so, I don't remember it. I think as far as our books were concerned it was never entered up. I will say this, as between us and the Tax Assessor we ought to have had it the year before and the year when they began to pay taxes, because it is expressly allowed in our contract with the Government; that every depreciation or something which answers to it shall be deducted; that we shall not be compelled to have our capital dissipated by confiscations to the Tax Assessor. I will say "for assessment" which is a better word.

Q. Then is it not a fact that you really think that this item of $45,510.46, which I understand you to say is the amount of money which should go to this sinking fund yearly?

A. No, $40,935.43.

Q. No, the $45,000.?

A. Yes.

Q. Is it not a fact that it is a proper charge?

A. Less what has already been paid.

Q. Is it not a fact that in your opinion that a proper charge against the Income for six months would be one-half of the amount of that sinking fund rather than all of it?

A. Well, I was going to say—you are asking me for an opinion, and I have already answered that before by saying that this question comes up at the end of the year; we overlook it at the middle of the year, and it is not a thing that takes care of itself, where a man takes your money and gives you a receipt; this is a journal entry which comes out of a course of sitting down and estimating your gains and profits in preparation to getting out your annual report for the stockholders, and it was not done on the 30th of June, 1905, and therefore we don't get the exemption of it, and it was

27 taken off for the whole period on the same basis at the other.

Q. I have here your Income Tax list for the year 1905 and it does not show any such item at all?

A. You are excusable. I would like to say one more word, and that is, if your return had had a line in there for other lawful deductions of every nature whatsoever on the right hand side of that thing, I think you would have got your sinking fund in there.

By Mr. PROSSER: It seems to me to size the whole proposition up is this: That the Rapid Transit Company are now seeking to put in a charge against their income which they inadvertently or for some reason did not put in at the time of the making of the return; now the question is if an entirely new matter can be now considered by this Court. That seems to me to be the issue between us.

(Prolonged discussion.)

By Mr. LANSING to witness:

Q. When you charged the power plant and the buildings with this percentage, what do they go to the credit of—you credited this plant and you made a debit to something, didn't you?

A. Yes, Sir.

Q. Did it go to any surplus account, or what?

A. Depreciation is charged directly to surplus and surplus is reduced by that amount, and the net surplus is reduced by the amount of depreciation for the year; it is just that much that you have got in the shape of surplus earnings. Of course it is just like an expense; it is gone forever for it is a depreciation; just as if someone had stolen that much of your property.

28 Q. Yes, but as I understand it——?

A. This is what we claim, that we have a right to charge up as an offset to our gross income in dealing with the Tax Assessor, a sinking fund of $45,000. a year, and in addition to that whatever depreciation it may be necessary to charge up to bring about a restoration of your capital at the end of the period, because the Legislature gives us that right to create this sinking fund, but does not deny us the right to charge up any actual losses incurred; if we can prove that there are losses by depreciation, we have a perfect right to charge that also.

By Mr. PROSSER:

Q. It is in addition to depreciation as a matter of fact——?

A. It is not in addition to depreciation, if the depreciation charged is so much that it would take care of the whole thing at the end of the period.

By Mr. J. BROWN to witness:

Q. You state that you were justified in deducting a certain amount under the provisions with the Government that made—that is, on account of the sinking fund you could do that?

A. Yes.

Q. Now do you consider that it is proper to deduct that amount for the whole year against the income of six months?

A. Personally I would say that as far as this thing is concerned, as being for six months, would seem to indicate our possible legal date to get a hump on ourselves and at the end of six months sit down and try to figure up out of a nebulous condition that you may be in at that time as to intangible gains and losses which are not going through your books. We do that once a year when we are getting ready to wind up for this year. But this was my contention,

29 Mr. Brown, that inasmuch as the law gives us that absolute right by contract to deduct that, and if we did not deduct it for the first six months, and if we do it at the end of the next six, and so that it is not for the six months period but for the whole period, and it is done only in accordance with our custom, we thought we ought to be entitled to it, because the law seems to contemplate a putting down of expense from day to day, little thinking of this contingency.

By Mr. WITHINGTON: This deduction is made in Exhibit 4, less depreciation written off in 1905, $45,935., that is under that heading the entry is made, and it finally comes out of surplus because the surplus is made of the balance of the income.

By Mr. WITHINGTON to Mr. Prosser:

Q. Are you through with Mr. Peck?
A. Yes.

By Mr. WITHINGTON: Now I make the suggestion that we have the stenographer write in the testimony of Mr. Ballentyne as in the other case.

By Mr. PROSSER: I don't think it is necessary to question the charges at all.

By Mr. WITHINGTON: I only want to have it appear.

By Mr. PROSSER: Admitting the question that those charges as made are the proper charges and are properly charged by the Territory of Hawaii.

By Mr. LANSING to Mr. Prosser:

Q. In case the Court should find that this depreciation is
30 allowable, what have you to say to all the other evidence.

By Mr. PROSSER:

A. Simply to say this: that the law contemplates that you are returning your income, and I should return mine and corporations theirs against which they should be charged the charges for the six months. So far as we are concerned, we will admit that this depreciation as it appears on their return here, if this Court decides that depreciation can be charged, is proper as to the sum; that we won't question the sum of it at all.

By Mr. WITHINGTON: I want to show you that this is not a depreciation in value but that it is wear and tear in use; that it is a wear and tear in use which is not made good by the annual repairs but the gradual disappearing of the system in use. I desire to have that evidence which I put on in the other case, in this case, either by having it incorporated or else by having the testimony of the witness.

By Mr. PROSSER: Then I will consent that every bit of the evidence taken before the Court may be taken by this Court and be referred to by this Court in making up this judgment.

By WITNESS: I wish to make an explanatory statement with relation to my foregoing testimony, that the item of $40,000, more or less, entered in here on the return as depreciation, represents actual wear and tear of the various parts of the system which could not be made good by ordinary repairs.

By Mr. PROSSER:

Q. Now, one question: Now take these bolts that you have
31 right here, they are illustrative of this wear and tear proposition?

A. Well, when it comes to the rails, you can see here are some bolts that have only been in use five or six years—four years in the railroad. If this is the effect of the elements on this you can assume that our percentage of the gradual oxidization of our rails

and other parts of the system is very much and fully as large as the percentage which we claim.

Q. And when these rails and spikes wear out you put in new ones, when the rails and spikes wear out you put in new ones?

A. The rails are this way: they will stand for a good many years and gradually disintegrate, and with regard to our roads, it is the same as other railroad companies in the United States; they will go over tracks sometimes when they ought to have been abandoned long before. They will hold up, but as far as their value is concerned if you should take one up you would see it was mere junk, even though it may answer the purpose. For instance, Desky's rails, they were taken up and sold for a mere song; that was the market value of them, but he could have gone on using them for some time to come. These things, although there is a good deal of iron in the center of them, they would hold for a long time to come, but in a very short time it would be absolutely valueless.

Q. Now you are continually repairing your road and putting in new rails?

A. Not new rails; we shall use our rails as long as they are useable, but their value is affected by the wear and tear.

Q. Then you are continually putting in new spikes?

A. Wherever to a certain extent, wherever we discover them, but they are covered up by concrete for 24 miles.

32 Q. And every time you make a repair of that kind, that is charged up against repairs?

A. Yes, for spikes, but for the loss of rails that is going on whether we take them up and sell them, or not.

Q. But when you do put in a new one that will be repairs?

A. Yes.

Q. And that charge that you make to repairs will go in the Income tax as a deduction of Income?

A. Not a penny has gone in this year; you are talking about probabilities now. Not a penny has gone in for the repairs of rails.

Q. Has there anything gone in there as to repairs of any portion of your plant?

A. All charged up to expense of repairs. For instance, we are putting in new frogs; we have to put in new ones and throw the old ones away or sell for junk. But the wear and tear on rails is going on all the time, but you cannot go and put in a brand new one then, and you cannot charge it up at the end of the period, because there is nothing to charge it there.

Q. And you break wheels on the cars?

A. Yes.

Q. What do you charge that to?

A. Repairs; but I will tell you another thing, we charge up repairs to our cars, but it does not make a new car. The car is not within 40% or 50% of what it was when it was new.

By Mr. WITHINGTON: I am closed with the exception that we can put in testimony from the other case.

By Mr. LANSING:

Q. What about briefs?

33 Mr. PROSSER: If the Court will indicate on what point they wish to have counsel submit briefs on, I will do so.

By Mr. J. BROWN to Mr. Withington:

Q. Do you wish to put in briefs Mr. Withington?

A. I think I had better. There is one point in this case and that is whether we — entitled to the whole or whether entitled to the half year.

By Mr. LANSING: In the Castle case we would like to get it in as quick as possible.

By Mr. WITHINGTON: We could have our brief by Wednesday or Thursday in both cases.

By Mr. PROSSER: I could have mine at the same time.

(The Court here instructed counsel that briefs in this case and the case of James B. Castle be submitted by Thursday, July 19th.)

At 12:15 p. m. there being no further business before the Court, adjournment was taken.

HONOLULU, T. H., *July 20th*, 1906.

I hereby certify the foregoing to be a true and correct transcript of my shorthand notes taken in the above case on Saturday, July 14th, 1906.

RALPH W. KEARNS,
Official Stenographer.

34 [Endorsed:] S. C. No. 150. Filed July 26 05. (Sg.) J. A. Thompson, Clerk.

35 Before the Tax Appeal Court of the First Judicial Circuit, Territory of Hawaii.

Appeal No. —.

HONOLULU RAPID TRANSIT & LAND COMPANY, Appellant,
vs.
JAMES HOLT, Tax Assessor, First Division, Appellee.

Decision.

The Appellant made an Income tax return for the six months period from July 1st to December 31st, 1905, in which it charged against its income for that period the sum of $40,935.43 as "Depreciation for the year 1905 written off December 31st, 1905." The Assessor approves of every other item of Receipts and Disbursements as returned by the Appellant but disallows the depreciation stated above. The Appellant claims that under Section 17 of its

franchise it is entitled to charge against Income certain amounts for a sinking fund, etc. which would aggregate more than the amount charged as depreciation. While this claim may be true as to expenditures actually made for these purposes, we do not find such charges deductible from taxable income when the same are merely in contemplation of expenditures which may later be made.

The Court is clearly of the opinion that depreciation on
36 properties or improvements cannot be allowed in reduction of incomes, and that the Tax Assessor was right in disallowing this item.

We, therefore, sustain the Assessor and find the net taxable income to be $29,409.58.

THEO. F. LANSING.
J. F. BROWN.
WILLARD E. BROWN.

Honolulu, July 24, 1906.

37 [Endorsed:] S. C. No. 150. Filed July 26/06. (Sg.) J. A. Thompson, Clerk.

38 Tax Appeal Court of the First Division, Island of Oahu, Territory of Hawaii.

HONOLULU RAPID TRANSIT AND LAND COMPANY, a Corporation,
vs.
JAMES L. HOLT, Tax Assessor.

Notice of Appeal.

Now comes the Honolulu Rapid Transit and Land Company, a Corporation, by its Attorneys Castle and Withington, and appeals from the decision of said Court filed herein on the 25th day of July, 1906 on an assessment of its income, to the Supreme Court of the said Territory.

HONOLULU RAPID TRANSIT AND LAND COMPANY,
By CASTLE & WITHINGTON,
Its Attorneys.

To James L. Holt, tax assessor:

Please take notice that the Honolulu Rapid Transit and Land Company has appealed from the decision of the Tax Appeal Court of the First Taxation Division as above.

HONOLULU RAPID TRANSIT AND LAND COMPANY,
By CASTLE & WITHINGTON,
Its Attorneys.

[Endorsed:] S. C. No. 150. Filed July 26/06. (Sg.) J. A. Thompson, Clerk.

39 Before the Tax Appeal Court of the First Judicial Circuit, Territory of Hawaii.

Income Tax Appeal No. —.

HONOLULU RAPID TRANSIT & LAND COMPANY, Appellant,
vs.
JAMES HOLT, TAX ASSESSOR, First Division, Appellee.

Certificate of Appeal.

I, Theodore F. Lansing, Chairman of the Tax Appeal Court for the First Taxation Division, Territory of Hawaii, do hereby certify that a hearing in the above entitled case was had before this Court on the foregoing appeal of the Honolulu Rapid Transit & Land Company, a corporation, from the assessment levied by the Assessor upon the Appellant's income for the six months period ending December 31st, 1905, returned by the Tax payer as Nil and assessed by the Tax Assessor at $29,409.58, which assessment was sustained by the Tax Appeal Court, from which decision by the Tax Appeal Court the Appellant having given notice of appeal to the Supreme Court and having filed a bond with surety in the sum of One Hundred Dollars ($100) to pay the cost of said appeal, I hereby certify up to the Supreme Court of the Territory of Hawaii the record of all proceedings had before the Tax Appeal Court in and concerning such questions, together with a copy of the evidence taken
40 before said Tax Appeal Court and the decision of said Tax Appeal Court in said cause.

In witness whereof, I have — set my hand this 26th day of July, A. D. 1906.

(Signed) THEO. F. LANSING,
Chairman Tax Appeal Court, First Taxation Division, Territory of Hawaii.

[Endorsed:] S. C. No. 150. Registered, Vol. 1, Page 124. Filed July 26/06. (Sg.) J. A. Thompson, clerk.

41 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

In re Assessment of Income Taxes, HONOLULU RAPID TRANSIT AND LAND COMPANY.

Appeal from Tax Appeal Court, Oahu.

In re Assessment of Property Taxes, HONOLULU RAPID TRANSIT AND LAND COMPANY.

Cross-appeals from Tax Appeal Court, Oahu.

Argued October 12, 16, 17, 1906; decided October 17, 1906.

Frear, C. J., Hartwell and Wilder, JJ.

Income Taxes—Depreciation of Property Not Deductible.—In estimating the amount of taxable net income, depreciation of property due to climate and wear and tear is not deductible under the head of losses actually sustained or incurred. Expenses for repairs or replacements when actually made may be deductible under the head of necessary expenses actually incurred.

Id.—Sinking Fund Not Deductible.—In estimating the net income of the corporation in question for the purposes of taxation, there cannot be deducted the amount which the corporation is permitted by its franchise act to set aside as a sinking fund (besides operating expenses and an 8% dividend) before dividing equally with the Territory the balance of the income.

Property Taxes—"Capital Issues" Do Not Include Bonds.—"Capital issues" do not include bonds, in a statutory provision that the
42 combined property of every corporation holding a public utility franchise other than such as are required to pay the Territory a percentage of its gross income shall be assessed at not less than the total amount of the "par value of the capital issues emitted" by it.

Id.—Franchise Taxable. The franchise of the corporation in question is not excluded or exempt from taxation by the Territory either under the provisions of the franchise act or as being a federal franchise.

Tax Appeal—Powers of This Court Not Restricted by Action of Tax Court.

This court may assess the property of a corporation as combined property even if the tax appeal court assessed it as separate items. The appeal is general.

43 *Oral Opinion.*

The first of these cases relates to the income taxes for the latter half of the year 1905 of the Honolulu Rapid Transit and Land Company, which conducts an electric street railway in Honolulu and whose franchise expires in 1928. The company returned to its gross income for the half year at $169,296.82 and deductions at $180,822.67 leaving no net income for taxation. Among the deductions was an item of $40,925.43 under the head of "losses otherwise actually incurred" as having been written off at the end of the year for depreciation of property during the entire year due to climatic and other conditions of wear and tear and not included in "necessary expenses actually incurred" in carrying on the business or for repairs, etc. The assessor disallowed this item, thereby leaving a net income of $29,409.58 for taxation, and the company appealed. Since this item was for depreciation during the entire year and since half of it if allowed for the half year in question would still leave a net income, the company endeavored to show before the tax appeal court that the actual depreciation for the year amounted to $57,827, which was the aggregate of various percentages estimated as depreciation on different portions of the property. It contended also that it was entitled to deduct $45,510.68 as "sinking fund," although it had not actually set aside that as sinking fund or claimed any such deduction in its return. This contention was based on section 17 of its franchise act (Rev. Laws, Sec. 851), which provides that the company may charge upon its income (1) operating expenses, etc., (2) dividends not exceeding 8 per cent., (3) *a sinking fund* for the redemption of bonds or other record debt and the capital upon the expiration of the franchise, (4) the excess of income to be divided equally between the Territory and the stockholders, (5) a quarterly account to be rendered by the corporation. The contention was that it would be a violation of the franchise not to
44 allow a deduction for a sinking fund for the purposes of taxation. The tax appeal court sustained the assessor and the company appealed to this court.

The second of these cases relates to the property taxes of the same company assessable as of January 1, 1906. The company returned its property as separate items aggregating in value $752,972.58, less an exemption amounting to $8,930.81, leaving a net valuation of $744,041.77 for taxation. It made no return of its property as a whole valued as property combined and made the basis of an enterprise for profit. The assessor added new items not returned and increased the values of certain items returned separately, the only change of much consequence being the addition of an item of $500,000 for the franchise of the corporation, and then assessed the entire property as a whole at $1,831,000, which was the amount of the company's stock and bonds less $9,000 exemption. He contended that he was required to do this by section 1216 of the Revised Laws as amended by Act 88 of the Laws of 1905, which provides that the combined property of a corporation of this class shall be assessed at

not less than the total amount of the "par value of the capital issues emitted" by it, the contention *contra* being that "capital issues" within the meaning of this statute does not include bonds and also that whether it includes bonds or not the statute is unconstitutional as placing an arbitrary valuation upon the property and making unreasonable discriminations. The tax appeal court held that capital issues did not include bonds and reduced the valuation below the assessment and the assessor appealed to this court. The tax court did not pass on the validity of the act, in case capital issues should be held to include stock, because it placed the valuation of the property at an amount greater than the capital stock of the company.

On the question of actual value, that is, aside from the provisions of the act just referred to, the assessor at the hearing before
45 the tax court introduced evidence of new items and increased valuation of old items, the result of which showed a total valuation of $1,458,000, and showed further that practically the same result would be reached by taking the aggregate of the stock and bonds less the exemption, namely, $350,000 of preferred stock at the market value of $101.50 per share, $800,000 of common stock at $66 less ten per cent., and the *bonds*, $690,000, at their par value, their market value being greater, and deducting the exemptions of about $9000, and referred to the decision of this court in 16 Haw., 802, rendered last year affirming an assessment of $1,351,015.95. The company contended, among other things, that the franchise was not taxable under the provisions of the franchise act, particularly section 17 above referred to, and section 30 (Rev. Laws, Sec. 865), which provides that the company's property shall not be liable to internal taxation while the railway is under construction provided that as fast as completed the completed portions shall become liable to such taxation; and also that the franchise was not taxable by the Territory for the reason that it was a federal franchise, inasmuch as the original franchise act, though enacted by the legislature of the Republic of Hawaii, was void because not approved by the president of Hawaii until the day, July 7, 1898, on which congress passed the joint resolution annexing these islands to the United States, and was validated only by the provision made by congress in section 73 of the organic act of the Territory ratifying, subject to the approval of the president, all dispositions of the public domain and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii between July 7, 1898, and September 28, 1899, and by the approval of the president in pursuance of that provision. The tax appeal court held that the franchise was taxable and fixed the several items of the company's property at such values as to aggregate $1,360,473.77, and found also that the value of the
46 property taken as a whole would be not far from that amount and accordingly fixed the valuation at $1,360,000. The company appealed to this court for a reduction from this amount on the grounds urged by it before the tax court, and contends further that the tax court, upon a proper construction of its decision, based its ultimate finding solely upon the valuations of the property re-

garded as separate items, and that this court cannot now base its decision upon the valuation of the property as a whole.

The foregoing statement of the case was prepared by the chief justice, who, at the close of the argument, the court not calling upon the assessor on the company's appeal in the second case, rendered the opinion of the court orally as follows:

FREAR, *C. J.*:

There are two cases before the court, one involving the income tax and the other the property tax of the Honolulu Rapid Transit and Land Co., there being cross appeals in the latter case.

In the first case two questions are raised. One is whether the company may write off a certain amount annually for depreciation in its property—in cases in which repairs cannot be made annually, as where certain portions of the property are used for a number of years before it completely wears out and requires replacing. In the opinion of this court this cannot be done. Such depreciation does not come under "losses actually sustained or otherwise actually incurred during the year," within the meaning of the statute on income taxes. If this loss may be deducted at all, it is when the repairs are made or the property replaced by substituting new property for it. It would then come within the provision of the statute allowing a deduction of "necessary expenses actually incurred," etc. This ruling is required by implication at least from the reasoning of the court in the *Hawaiian Commercial* case, 14 Haw. 601 and, on rehearing, 687, and by the case there cited from the
47 United States Supreme Court, Grant *v.* Hartford & N. H. Ry. Co., 93 U. S. 225.

The court is clearly of the opinion that the other point also is not well taken—that an amount may be deducted for a sinking fund. That provision of the statute—relating to a sinking fund—was inserted merely with a view to ascertaining in what income the government should participate, not with a view to making the sinking fund a deductible amount for purposes of taxation any more than would be the case with any other company or corporation which might set aside a sinking fund as a good business proposition.

We now come to the second case, that involving the property tax, taking up first the appeal of the assessor. This, as we understand it, is based upon the statute enacted by the legislature of 1905, act 88, which provides that "the combined property of every corporation holding a public utility franchise and occupying the public streets or highways of the Territory, other than any such corporation that by the terms of its franchise is required to pay a percentage of its gross income to the Territory, shall be valued and assessed at not less than the total amount of the par value of the capital issues emitted by such corporation." The court is of the opinion that the phrase "capital issues" is of such ambiguity and uncertainty that it ought not to be held to include bonds issued by a corporation or other evidence of indebtedness. There is no doubt that statutes of this nature should be construed strictly. That has often been held by this court—there are a great many cases in the Hawaiian reports as well as elsewhere—and it is particularly applicable in a

case like this in which there is at least very grave doubt as to the constitutionality of the statute.

In view of this ruling and other rulings that we are about to make it will be unnecessary to go into the question of the constitutionality of the statute.

48 Coming to the appeal of the taxpayer, the main question is whether the franchise is taxable. We see nothing in the act itself which would exclude the franchise from taxation. "The imposition of a property tax upon the combined property of the company, including the franchise, would not be inconsistent with the franchise itself or the provisions of sections 17 and 30 of the franchise act." "The court is also of the opinion that this is not a federal franchise such as could not be taxed *by* the Territory. The franchise act was passed by the Republic of Hawaii, and congress, if its act (section 73 of the organic act) touches this at all—we do not mean to question that—simply ratified what had already been done. Its ratification was nothing more in effect than a previous authorization would have been. There certainly could not have been an intention on the part of congress to grant a special franchise in the nature of other special franchises granted by it so as to take it out of the jurisdiction of the Territory of Hawaii for purposes of taxation."

So far as the actual value found by the tax appeal court is concerned, we see no reason to alter it. The amount is only slightly greater than was fixed by this court in a previous case, and the property, all things considered—the combined property—seems to be worth that amount from whatever standpoint we look at it. Certainly, considering the amount of the bonds and stock, the latter at a fair valuation, we would be justified in fixing that amount.

Mr. Justice Hartwell suggests that I may have implied that the court meant to hold that in the act of 1905 the phrase "capital issues" includes stock although we do not hold that it includes bonds. We, at least speaking for myself and for Mr. Justice Wilder, express no opinion upon that question.

HARTWELL, *J.*:

My own opinion is that the phrase appears absolutely insensible. It is the most elusive phraseology that I have ever tried to interpret. Some people seem to understand what it means, but I think that is because they know, but as I do not know what was intended by "capital issues emitted" there seems to me to be an absolute

49 confusion of thought.

FREAR, *C. J.*:

There is a further point that I did not refer to. The case is before this court on general appeal and the court can make the assessment on the basis of an enterprise for profit.

M. F. Prosser, Deputy Attorney General, (E. C. Peters, Attorney General, on the briefs) for the Tax Assessor.

D. L. Withington (Castle & Withington on the briefs) for the taxpayer.

S. M. Ballou (Ballou & Marx on the brief) also for the taxpayer in the second case.

By the Court:

(Sg.) J. A. THOMPSON, *Clerk.*

50 [Endorsed:] Filed October 29, 1906, at 10 A. M. by order of Court. (Sg.) J. A. Thompson.

51 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

In re Assessment of Income Tax, HONOLULU RAPID TRANSIT AND LAND COMPANY.

Appeal from Tax Appeal Court, Oahu.

Judgment.

Now, on this 12th day of October, 1906, the above cause having been duly argued and submitted to this Court, and a decision rendered herein and the same having been filed together with a statement of facts on the 29th day of October, 1906,

Now, therefore, it is ordered and adjudged by the Court that the decision of the said Tax Appeal Court for the Island of Oahu be and the same is hereby affirmed.

By the Court,

Entered this 21st day of November, A. D. 1906.

(Sg.) J. A. THOMPSON,

[SEAL.] *Clerk of the Supreme Court of the Territory of Hawaii.*

52 [Endorsed:] No. —. Supreme Court, Territory of Hawaii. *In re* Assessment of Income Tax, Honolulu Rapid Transit & Land Co. Judgment. Filed November 21, 1906, @ 10 A. M. (Sg.) J. A. Thompson, Clerk. Castle & Withington, Attorneys for Defendant.

53 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

HONOLULU RAPID TRANSIT & LAND COMPANY, Appellant,

vs.

JAMES L. HOLT, Assessor, Appellee.

Re Assessment of Income Tax.

Petition for Writ of Error.

Honolulu Rapid Transit and Land Company, appellant in the above entitled cause feeling itself aggrieved by the judgment entered therein on the 21st day of November 1906, comes now by Castle

& Withington, its attorneys, and petitions said Court for an order allowing said appellant to prosecute a writ of error to the Honorable Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the appellant shall give and furnish upon saod Writ of Error, and that upon the giving of such security all further proceedings in this Court shall be suspended and stayed until the determination of the said Writ of Error by the Supreme Court of the United States.

And your petitioner will every pray.

(Sg.) CASTLE & WITHINGTON,
Attorneys for the Appellant.

54 [Endorsed:] No. —. Supreme Court, Territory of Hawaii. Honolulu Rapid Transit and Land Company *vs.* James L. Holt, Assessor. Petition for Writ of Error. Filed Dec. 1st, 1906. (Sg.) Henry Smith, Clerk Supreme Court, Ter. of Hawaii. Castle & Withington, attorneys for appellant.

55 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

HONOLULU RAPID TRANSIT AND LAND COMPANY, Plaintiff-in-Error,
vs.
JAMES L. HOLT, Assessor, Defendant-in-Error.

Re Assessment of Income Tax.

Bond on Writ of Error.

Know all men by these presents: That we, the Honolulu Rapid Transit and Land Company, George P. Castle and Charles H. Atherton, all of Honolulu, in the County and Island of Oahu and Territory of Hawaii, are held and firmly bound unto the above named James L. Holt, Assessor, in the sum of One Thousand Dollars to be paid to the said James L. Holt, Assessor, his successors and representatives, for the payment of which well and truly to be made, we bind ourselves, and each of us, our, and each of our, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 30 day of November 1906.

Whereas, the above named Plaintiff-in-error has prosecuted a Writ of Error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the Supreme Court of the Territory of Hawaii:

Now, therefore, the condition of this obligation is such that if the above named Plaintiff-in-error shall prosecute said Writ of Error to effect and answer all damages and costs, if it shall fail to

make good its plea, then this obligation shall be void. Otherwise to remain in full force and effect.

HONOLULU RAPID TRANSIT AND LAND COMPANY,
[SEAL.] (Sg.) By L. TENNY PECK, *Its President.*
(Sg.) By CHAS. H. ATHERTON, *Its Treasurer.*
(Sg.) GEORGE P. CASTLE. [SEAL.]
(Sg.) CHAS. H. ATHERTON. [SEAL.]

Approved by:

(Sg.) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Honolulu, Dec. 1, 1906.

56 [Endorsed:] No. —. Supreme Court, Territory of Hawaii. Honolulu Rapid Transit and Land Company *vs.* James L. Holt, Assessor. Bond on Writ of Error. Filed Dec. 1st, 1906. (Sg.) Henry Smith, Clerk Supreme Court, Ter. of Hawaii. Castle & Withington, attorneys for plaintiff-in-error.

57 In the Supreme Court of the United States.

HONOLULU RAPID TRANSIT AND LAND COMPANY, Appellant and Plaintiff in Error,
vs.
JAMES L. HOLT, Assessor, Appellee and Defendant in Error.

In Error to the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now comes the appellant and plaintiff in error, and for assignment of errors alleges that the Supreme Court of the Territory of Hawaii committed error in its judgment as follows, to-wit:—

Assignment of Error Number One.

This is an appeal from the Tax Appeal Court of the Island of Oahu, affirming an assessment by the Appellee of an income tax assessed on the defendant, and the defendant is a street railway corporation operating a street railway system in the streets of Honolulu, Territory of Hawaii, and by virtue of a franchise granted by the Legislature of the Republic of Hawaii, July 7, 1898, and confirmed by Act of Congress of the United States entitled "An Act to provide a franchise for the Territory of Hawaii," approved April 30, 1900, said franchise being approved by the President of the United States on the 25th day of June, A. D. 1900, under and by virtue of which franchise it was provided:—

58 "SECTION 17. The following charges shall be lawful upon the income of said railway:

1st. The expense of operating, repairs, renewals, extensions, interest, and every other cost and charge properly or necessarily connected with the maintenance and operation of said railway.

2nd. Dividends may be paid to the stockholders not to exceed eight per cent. on the par value of the stock issued.

3rd. A sinking fund may be created for the redemption of any bond which may be issued or other record debt and the capital upon the expiration of the franchise. Provided, however, that the amount placed to the credit of such sinking fund annually, shall not exceed in amount, such a sum with interest computed at five per cent. per annum, compounded, as will principal and interest combined, at maturity, equal the par value of the bonds, record and capital debt aforesaid.

4th. The excess of income shall be divided equally between the Government of the Republic of Hawaii and the stockholders of said corporation.

5th. A quarterly account or trial balance of the corporation shall be rendered by the corporation to the Minister of the Interior from the beginning of the actual construction of the railway."

"SECTION 30. All material required by the said association and others to be used for the purpose of this Act, when imported from the United States, and being the product and manufacture of the said United States shall be free of duty, and the property of the said association and others shall not be liable to internal taxation while said railway is under construction, provided that as fast as completed and equipped portions shall become liable to such taxation."

The appellant and plaintiff in error claims:

1. That the items of depreciation, which as the return showed was for wear and tear not covered by the repairs, should have been allowed.

2. That Act 69 of the Laws of 1898, the Organic Act and the approval of the President, constitute a contract the terms of which are defined by Section 17 of said Act 69, and by said contract the company is authorized to deduct from its income not only the items contained in the deduction shown by its return, but also the expense of the renewals, extensions and every other cost and charge properly or necessarily connected with the maintenance and operation
59 of said railway, second, dividends not to exceed 8 and third, a sinking fund computed at 5% per annum on its record debt and capital.

3. That the Acts referred to in the last paragraph constitute a contract between the Territory and the corporation and that under said contract no tax can be levied other than a tax upon the completed and equipped portion of the railroad, and license tax, $10 per annum upon each passenger car used by it.

4. That it is a violation of article 5th and Article 14th of the Amendments of the Constitution of the United States to deprive the corporation of, and to take the amount of this tax from said cor-

poration without due process of law and without just compensation, and further that it denies to the corporation the equal protection of the law.

And this Appellent and Plaintiff in error claims that the Supreme Court committed error in its judgment in denying said contention and in holding that said Section 17 "was inserted merely with a view to ascertain in what income the Government should participate, not with a view to make the sinking fund a deductable amount for purposes of taxation."

Assignment of Error Number Two.

That the said Supreme Court erred in holding under the conditions set out in Assignment of Errors Number One that wear and tear not covered by repairs should not be allowed.

Assignment of Error Number Three.

That the Supreme Court erred under the conditions set out in Assignment of Errors Number One, in denying the contention of the plaintiff in error that the Act, the Organic Act and the approval of the President constituted a contract, the terms of which are defined by Section 17, and that by the contract the expenses
60 of renewal, extensions and charges of maintenance and operation of said railway, dividends not to exceed eight per cent. and a sinking fund computed at five per cent. per annum on its record debt and capital, should be deducted.

Assignment of Error Number Four.

That the said Supreme Court erred in denying the contention of petitioner that under the conditions set out in Assignment of Error Number One a contract between the Territory and the corporation was made and that under said contract no taxes could be levied other than a tax upon the completed portion of the railroad and a license tax.

Assignment of Error Number Five.

That the said Supreme Court erred under the conditions set out in Assignment of Error Number One in denying the contention of the plaintiff in error that it was a violation of Article Five of the Amendments of the Constitution of the United States to take the amount of this tax and that it was a deprivation of property without due process of law and a taking without just compensation.

Assignment of Error Number Six.

That the said Supreme Court erred under the conditions set out in Assignment of Error Number One, in denying the contention of the plaintiff in error that to take the amount of this tax from this corporation is a violation of Article 14 of the Amendments of the Constitution of the United States in that it deprives said corporation

of property without due process of law and denies to the corporation the equal protection of the laws.

61 Wherefore, the said Honolulu Rapid Transit and Land Company, appellant and plaintiff in error, prays that the judgment of the said Supreme Court may be reversed and that the said Supreme Court be ordered to allow said deductions and deny said assessment.

(Sg.) W. R. CASTLE.
(Sg.) DAVID L. WITHINGTON,
(Sg.) CASTLE & WITHINGTON,
Attorneys for Honolulu Rapid Transit & Land Company, Appellent and Plaintiff in Error.

Dated November 28th, 1906.

62 [Endorsed:] No. —. Supreme Court, Territory of Hawaii. Honolulu Rapid Transit & Land Co., appellant and plaintiff in error, *vs.* James L. Holt, assessor, appellee and defendant in error. Assignment of error. Filed Dec. 1st, 1906. (Sg.) Henry Smith, clerk Supreme Court, Ter. of Hawaii. Castle & Withington, attorneys for ——.

63 In the Supreme Court of the Territory of Hawaii, October Term 1906.

HONOLULU RAPID TRANSIT AND LAND COMPANY, Appellant,
vs.
JAMES L. HOLT, Assessor, Appellee.

Re Assessment of Income Tax.

Order Allowing Writ of Error.

Upon motion of David L. Withington, Esq., one of the attorneys for the appellant, and upon filing a Petition for Writ of Error and an Assignment of Errors, it is ordered that a Writ of Error be, and hereby is, allowed, to have reviewed in the Supreme Court of the United States, the judgment heretofore entered herein, and that the amount of the bond on said Writ of Error be, and hereby is, fixed at $1000.00.

Honolulu, Dec. 1, 1906.

(Sg.) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

64 [Endorsed:] No. —. Supreme Court, Territory of Hawaii. Honolulu Rapid Transit and Land Company *vs.* James L. Holt, assessor. Order allowing writ of error. Filed Dec. 1st, 1906. (Sg.) Henry Smith, clerk Supreme Court, Ter. of Hawaii. Castle & Withington, attorneys for appellant.

65 In the Supreme Court of the United States.

HONOLULU RAPID TRANSIT AND LAND COMPANY, Plaintiff in Error,
vs.
JAMES L. HOLT, Assessor, Defendant in Error.

Re Assessment of Income Tax.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the Judges of the Supreme Court of the Territory of Hawaii, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Hawaii, before you or some of you, being the highest court of law or equity, of the said Territory, in which a decision could be had in the said suit between the Honolulu Rapid Transit and Land Company, Appellant, and Plaintiff In Error, and James L. Holt, Assessor, Appellee and Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, said Territory, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of the Constitution or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution,
66 treaty, statute or commission; a manifest error hath happened to the great damage of the said Honolulu Rapid Transit and Land Company as by its complaint appears.

We being willing that error, if any hath been made, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 30th day of January next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the 1st day of December, in the year of our Lord, One Thousand Nine Hundred and six.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

Allowed by
W. F. FREAR,
Chief Justice of the Supreme Court
of the Territory of Hawaii.

67 In the Supreme Court of the United States.

HONOLULU RAPID TRANSIT AND LAND COMPANY, Plaintiff in Error,
vs.
JAMES L. HOLT, Assessor, Defendant in Error.

Re Assessment of Income Tax.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to James L. Holt, assessor:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's office of the Supreme Court of the Territory of Hawaii, wherein the Honolulu Rapid Transit and Land Company is plaintiff in error, and you — defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff-in-error as in its said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, this 1st day of December in the year of Our Lord One thousand nine hundred and six.

[Seal Supreme Court, Territory of Hawaii.]

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

68 [Endorsed:] In the Supreme Court of the United States. Honolulu Rapid Transit and Land Company *vs.* James L. Holt, assessor. Writ of error & citation. Filed Dec. 1st, 1906. Henry Smith, clerk Supreme Court, Ter. of Hawaii. Castle & Withington, attorneys for the plaintiff in error.

Service of the within and foregoing writ of error & citation and the receipt of a copy thereof admitted this 1st day of December 1906.

E. C. PETERS,
Attorney General for the Territory of Hawaii & Attorney for the Defendant in Error.

69 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

HONOLULU RAPID TRANSIT AND LAND COMPANY, Plaintiff in Error,
vs.
JAMES L. HOLT, Assessor, Defendant in Error.

Re Assessment of Income Tax.

UNITED STATES OF AMERICA, *Territory of Hawaii:*

I, Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the foregoing pages, numbered from 1 to 68, inclusive, contain a true and complete transcript of the record and proceedings, had in said Court in the cause of Honolulu Rapid Transit and Land Company, plaintiff-in-error, against James L. Holt, assessor, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at Honolulu in the Territory of Hawaii, this 10th day of January 1907.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

Endorsed on cover: File No. 20,577. Hawaii Territory supreme court. Term No. 234. Honolulu Rapid Transit and Land Company, plaintiff in error, *vs.* James L. Holt, assessor. Filed February 16, 1907. File No. 20,577.

Supreme Court of the United States.

OCTOBER TERM, 1907.

HONOLULU RAPID TRANSIT AND LAND COMPANY, Plaintiff in Error, vs. JAMES L. HOLT, Assessor.	No. [illegible] In Error to the Supreme Court of the Terri[illegible] copy of Record

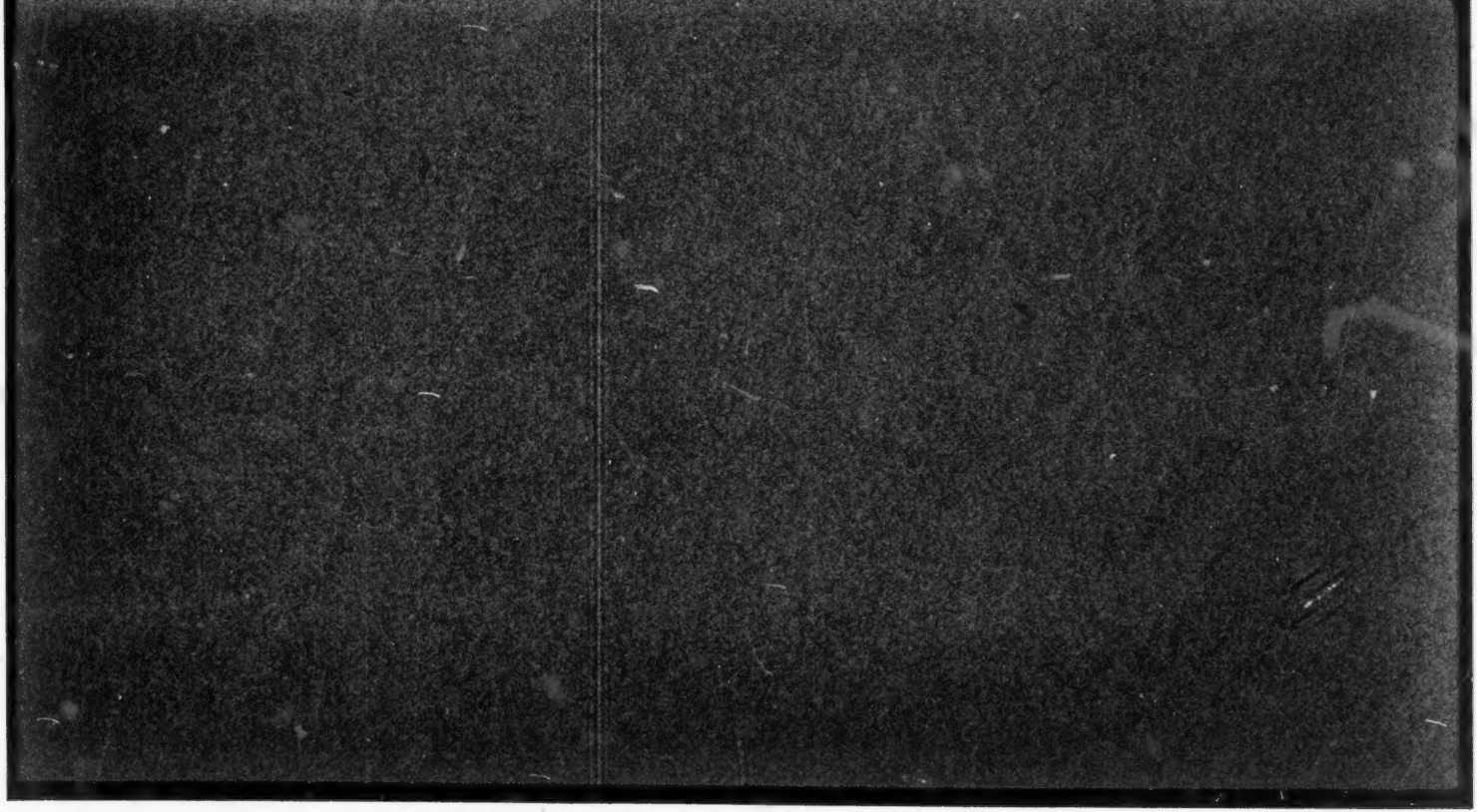
BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM R. CASTLE,

DAVID L. WITHINGTON,

For the Plaintiff in Error.

HONOLULU:
Hawaiian Gazette Co., Ltd.,
1907.



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Supreme Court of the United States.

OCTOBER TERM, 1907.

HONOLULU RAPID TRANSIT AND LAND COMPANY, Plaintiff-in Error, vs. JAMES L. HOLT, Assessor.	No. 234. In Error to the Supreme Court of the Territory of Hawaii.

BRIEF FOR PLAINTIFF-IN-ERROR.

STATEMENT.

This is a writ of error to review a judgment of the Supreme Court of the Territory of Hawaii rendered November 21, 1906, affirming the decision of the Tax Appeal Court for the Island of Oahu rendered July 24, 1906, finding the net taxable income of the Honolulu Rapid Transit and Land Company to be $29,409.58 and disallowing as a deduction from the said income an item of $40,935.43 claimed among the deductions from income as "depreciation for the year 1905, written off September 31, 1905," and also the claim that under Section 17 of the franchise it was entitled to charge against income certain amounts for a sinking fund, etc., which would aggregate more than the amount charged to depreciation (Tr. pp. 23-34, folios 35-36); from which decision Plaintiff-in-error appealed to the Supreme Court of Hawaii.

The Plaintiff-in-error is a corporation organized in pursuance to and holding the franchise granted by the Act of the Republic

of Hawaii approved July 7, 1898, and also by the President of the United States of America June 25, 1900, under and by virtue of the Organic Act of the Territory of Hawaii April 30, 1900 (31 St. at L. 141, c. 339); the material parts of which Act, of the Organic Act and of the Revised Laws of Hawaii, 1905, so far as necessary to understand the question of taxation involved, are printed in the appendix.

The question whether this is a federal franchise, and taxable, is also before this court on appeal in No. 235 of this term.

Under Section 1283 of the Revised Laws of Hawaii, 1905, (Tr. p. 1, folio 1), every person having an income of one thousand dollars or more for any taxation period, or of five hundred dollars or more for the first taxation period, was required to make a return of his income in such form as the Treasurer of the Territory should direct. The first taxation period happened to be that for the six months ending December 31, 1905, the law making a change so that the year would end the 31st day of December instead of the 30th day of June, and in order to accomplish this a half-year period was created. Under this the Plaintiff-in-error made the return shown on pages 1 to 7 of the transcript, disclosing a total income of $169,296.82 and claiming deductions aggregating $180,822.67, leaving no net income subject to the tax. No question was made between the parties as to the gross income. (Tr. p. 10, folio 11). The only item which was not allowed was the item found in Tr. p. 5, as follows:

"(9) Losses otherwise actually incurred.....
(Insert under this heading any losses you have actually sustained which cannot be properly inserted under any of the previous items.)
Written off Dec. 31, '05 as depreciation in year 1905 .....40,935.43"

This item was not allowed (Tr. p. 11, folio 12), no question was made as to the amount, the point being made that depreciation could not be charged, the Attorney-General saying: "We will admit that this depreciation as it appears on their return here, if this Court decides that depreciation can be charged, is proper as to the sum; that we won't question the sum of it at all." (Tr. p. 21, folio 30).

Annexed to the return were certain questions to be answered, and in reference to the item in dispute the Plaintiff-in-error had answered as follows: (Tr. p. 6, folio .)

"Question 5. What are the particular items of 'Losses' set forth by you opposite paragraphs 7, 8 and 9 of 'Deductions' and when did each occur?

"Answer 5. '9 Sch. B' Consists of depreciation by reason of climatic and other conditions of wear and tear."

The Plaintiff-in-error also claimed at the hearing that, in case the item for depreciation was not allowed, it should be allowed a deduction for sinking fund on the capital and indebtedness under Section 17 of said Act, amounting to $45,510.68, viz.: Upon capital, $28,444.22; for the bond issue, $17,066.46 (Tr. p. 16, folio 21). It was objected, on the part of the Territory, that only one-half of these items could be charged.

ERRORS ASSIGNED.

Under Section 17 of the Act, which provides the charges which are lawful on the income and makes a sinking fund a charge, and under Section 30, providing the form of taxation to which the company was liable, the Plaintiff-in-error claims:

1. That the item of depreciation, which as the return showed was for wear and tear not covered by the repairs, should have been allowed.

2. That Act 69 of the Laws of 1898, the Organic Act and the approval of the President, constitute a contract the terms of

which are defined by Section 17 of said Act 69, and by said contract the company is authorized to deduct from its income not only the items contained in the deduction shown by its return, but also the expense of the renewals, extensions and every other cost and charge properly or necessarily connected with the maintenance and operation of said railway, second, dividends not to exceed 8%, and third, a sinking fund computed at 5% per annum on its record debt and capital.

3. That the Acts referred to in the last paragraph constitute a contract between the Territory and the corporation and that under said contract no tax can be levied other than a tax upon the completed and equipped portion of the railroad, and license tax, $10 per annum upon each passenger car used by it.

4. That it is a violation of Article 5th and Article 14th of the Amendments of the Constitution of the United States to deprive the corporation of, and to take the amount of this tax from said corporation without due process of law and without just compensation, and further that it denies to the corporation the equal protection of the law.

5. That the Supreme Court committed error in holding that said Section 17 "was inserted merely with a view to ascertain in what income the Government should participate, not with a view to make the sinking fund a deductable amount for purposes of taxation."

(Tr. pp. 34 and 35, folio 59.)

Each of these specifications under "Assignment of Error Number one" is again assigned in somewhat different form.

ARGUMENT.

I.

WEAR AND TEAR IS AN EXPENSE NECESSARILY CONNECTED WITH THE MAINTENANCE AND OPERATION OF SAID RAILWAY, AND THEREFORE A LAWFUL CHARGE AGAINST THE INCOME.

The particular sections of the Revised Laws of Hawaii which are involved are 1280 and 1281, and other sections which are important for comparison are 1282, 1278 and 1279; which are found in the appendix.

The section of the franchise to be construed is Section 17, providing what charges are lawful upon the income.

The question involved is whether, construing the provisions of the income tax act in connection with Section 17, the item of wear and tear should be allowed. In other words, is the item of $40,935.43 to be included in the computation "of the net profit or income above actual operating and business expenses" of the Plaintiff-in-error? Is it a necessary expense "actually incurred in carrying on a business," or a loss "actually sustained during the taxation period," or a loss "otherwise actually incurred," or is it an "expense of operation" deductible from income under the provisions of Section 17.

Depreciation, so far as it constitutes wear and tear of implements used either in production or in transportation, is an essential part of the cost of operation, and is not only a loss actually incurred, but an expenditure of material in use, and as much a part of the cost of operation as the coal or oil burned in operating the road.

Under the definition of taxable "income" in Sections 1278, 1279, 1280 and 1281 this sum of $40,935.43 is not included. It is not "the gains, profits and income" from a business defined

in Section 1278. It is not "net profit or income above actual operating and business expenses" under Section 1279. It is not "gains, profits and income" spoken of in Section 1280. Nor is it "the net profit or income * * * distributed or distributable" among shareholders, "or used for construction, enlargement of plant or any other expenditure or investment paid from the net profits" under Section 1281. Moreover, our contention is fortified by the deduction provided for in the last section. This is a "necessary expense actually incurred in carrying on" the business of the Honolulu Rapid Transit and Land Company, if not a loss actually incurred; and this is further shown by the proviso as to what deduction shall be made, that one shall be made "for new buildings, permanent improvements or betterments made to increase the value of any property or estate." Supposing our power-house should be burned down: the new structure would be a new building. Supposing, as in San Francisco, our entire and permanent track and overhead structure were destroyed: the new structure would be a permanent improvement.

The question which arises under this point is whether, under a proper construction of the various statutes, wear and tear in use is, with respect to this particular railroad, an expense of operation, properly chargeable to income. Our contention is that, both under the provisions of Section 17 and the income tax law, wear and tear in use is such an expense; that the "net profit or income above actual operating and business expenses" must be some gain or profit over the year before, and this wear and tear is neither a gain nor a profit, but is a loss which will never return. This marks a distinction between wear and tear and estimated values, fluctuating with the conditions of the market. What we are claiming is something used up in operation.

The specific language to be considered in Section 1280 is the amount expended in the production of the crop; in 1281, the expense incurred in carrying on the business. It would appear, then, that the amount expended, in Section 1280, includes not only amounts paid out, but amounts incurred. The words to be construed are, therefore, "Amount," "Expended," "Expenses," "Incurred."

"AMOUNT."

It seems to be well settled that the word "Amount," as used in a statute of this kind, is synonymous with "Value."

Durgin v. Colburn, 176 Mass. 110.

Anderson v. Huff, 49 N. J. Eq. 349.

People v. Tax Commissioners, 69 N. Y. 91.

"EXPENDED"—"EXPENSES."

"We speak of the expenses of an undertaking; whether the undertaking is merely contemplated or is fully performed, and whether the costs and charges were paid in advance, or upon performance, or remain unpaid. In these senses the term is employed in statutes, and its precise signification in each case must be ascertained from the context."

Sullivan v. Triunfo Mining Co., 39 Cal. 459.

Under Section 4929 of the Revised Statutes of the United States, authorizing the issue of a design patent, the word "expense" has been held not to be limited to mere pecuniary expense.

"No authority can be found to compel the limitation of the word 'expense,' in the construction of this statute, to the 'expenditure of money.' It may, indeed, be defined as a 'disbursement of money,' but it is as well 'the employment and consumption of time and labor.' Cent. Dict. tit. 'Expense.' This statute, then, has made use of a word, in its expression, which bears rightfully two meanings. Which should be accepted as the more proper? Certainly that which common sense and good faith will

approve; for the object in construing a statute must always be, not to bend and twist and shape the text until it is forced into apparent harmony with some doubtful claim, or into the mold of a preconceived idea, but simply and solely to discover, disclose and fix the true sense, whatever that may be."

Matthews & Willard Mfg. Co. v. Trenton Co., 73 Fed. 212.

The Century Dictionary defines "Expense" as follows:

"EXPENSE. 4. Cost through diminution or deterioration; damage or loss from any detracting cause."

The Standard Dictionary defines "Expense:"

"EXPENSE. 1. The laying out or expending of money or other resources, as time or strength; disbursement; expenditure; hence, drain on resources; detriment; loss."

The latter dictionary defines "Profit" as follows:

"PROFIT. 2. Value acquired over and above the value parted with in the course of acquirement."

Turning now to adjudicated cases.

"The word 'profits' signifies an excess of the value of returns over the value of advances."

People v. Savings Union, 72 Cal. 199.

Expenses include damages occasioned by the location of a road.

Damon v. Reading, 2 Gray 274.

Brigham v. Worcester, 147 Mass. 446.

"All expenditures of earning income" are chargeable.

Polland v. L. V. R. Co., 52 Vt. 100.

Mobile & Ohio R. R. Co. v. Tennessee, 153 U. S. 486.

"Profit" means "acquisition beyond expenditure; excess of value received for producing, keeping, or selling, over cost; hence, pecuniary gain in any transaction or occupation; emolument." Webster Int. Dict. p. 1144.

Mundy v. Van House, 104 Ga. 625; 30 S. E. 783.

The question then recurs, what is the cost of the operation of the road? When we turn to recognized authorities on accounting, we find this $40,935.43 declared to be a part of the cost.

In relation to profit and loss, depreciation enters as an element in the cost of manufacture represented by the deterioration by wear and tear, decay or reduction of value arising by reason of age and use of buildings, fixed and loose machinery and plant of every description employed in the production of things produced for sale or disposal in the ordinary way of trade.

The immediate point of difference, at the time of the taking of an account, between actual material consumed directly and immediately in a manufacturing process and depreciation or consumption of plant, is, that the former is capable of being weighed and measured and its cost ascertained and charged with precision, whilst the extent to which the buildings and machinery employed have been consumed *cannot* be identified with precision. Such consumption (depreciated) has thus of necessity to be *estimated* in the making up of a periodical account.

The practical question in connection with this subject is the determination of the true assessing of depreciation as an element in the cost of production and the bringing into the balance-sheet, co-relative with the manufacturing account, of a true value representing the unconsumed residue of buildings and plant, in the same way as the unconsumed materials and stores, commonly called stock in trade, are enumerated amongst the assets.

2 Enc. of Accounting 357, Edwin Guthrie, F. C. A.

The same rule is laid down in:

Cost Accounts, C. A. Millener, LL.B., LL.M., p. 8.

Corporation Accounting and Auditing, D. A. Keister, p. 374.

Annals of the American Academy of Political and Social Science, Vol. XXII., No. 3, p. 26.

In computing net profits from which dividends can be paid, "the wear and tear of machinery and the depreciation of real estate" are necessary items.

"It cannot be successfully contended that all such machinery is not subject to depreciation from wear and tear or actual use. That all machinery does not suffer alike is equally plain. Those who deal in or use the different kinds are best informed as to the extent of depreciation in the different articles."

Whitaker v. Amwell Nat. Bank, 52 N. J. Eq. 400; 29 Atlantic 203.

"In the case of railroad companies and other corporations whose capital stock is invested in rolling stock, tracks, buildings, machinery, or other property which must become worn and depreciated in value in its use, and which will have to be repaired or renewed from time to time, the wear of the property and necessity for repairs must be taken into consideration in estimating profits for the purpose of declaring dividends, and a sufficient sum should be set aside to create a reserve fund for repairs and renewals."

Marshall on Corporations, Sec. 284.

Davidson v. Gillies, 16 Ch. Div. 347, note, 2 Keeners' Cas. 1342.

"Net income, net earnings, or profits, which mean the gain with both receipts and expenditures taken into account."

Cooley on Taxation, p. 685.

To express it in comprehensive form, it is the "creation of capital, industry, and skill."

Idem, page 390.

Wilcox v. Middlesex County, 103 Mass. 544.

"The value of the capital stock of a corporation and its franchise for the purpose of taxation is determined by ascertaining the true net earnings, which is the gross earnings reduced by the annual expenditures, increased debts and the *current depreciation* in its tangible property."

Chicago Union Traction Co. v. State Board of Equalization, and sundry other suits, 114 Fed. 557.

In 2 Cook on Corporations, sect. 546, it is said:

"A proper sum must first be expended or set aside for repairs and reconstruction, to replace depreciation due to wear and tear (2). In other words, the fund available for dividends is ascertained by taking into account the cost of repairs and a reasonable allowance for depreciation, giving credit for all actual permanent improvements (3).

(2) In *Davison v. Gillies*, L. R. 16 Ch. D. 347 note (1879), the Court, at the instance of a stockholder, enjoined the declaration of a dividend on the ground that the street railway track of the company had become worn out and needed very expensive repairs, for which no provision had been made by the company, and that this capital so used up must be restored before a dividend was declared. The by-laws prohibited dividends except from profits. The Court said: "A tramway company lay down a new tramway. Of course the ordinary wear and tear of the rails and sleepers and so on causes a sum of money to be required from year to year in repairs. It may or may not be desirable to do the repairs all at once; but if at the end of the first year the line of tramway is still in so good a state of repair that it requires nothing to be laid out on it for repairs in that year, still, before you can ascertain the net profits, a sum of money ought to be set aside as representing the amount in which the wear and tear of the line has, I may say, so far depreciated it in value as that that sum will be required for the next year or the next two years * * * I should think no commercial man would doubt that this is the right course; that he must not calculate net profits until he has provided for all the ordinary repairs and wear and tear occasioned by his business. * * * That being so, it appears to me that you can have no net profits unless this sum has been set aside. When you come to the next year, or the third or fourth year, what happens is this: As the line gets older, the amount required for repairs increased. If you had done what you ought to have done, that is, set aside every year the sum necessary to make good the wear and tear in that year, then in the following years you would have fund sufficient to meet the extra cost."

See also quotation from Green Corporation Finance (1897, pages 83-114) given by Cook, Note (3).

Our view is further fortified, if not conclusively proved, by the construction put by this court on the Internal Revenue Law as amended by the Act of 1866, placing a tax of five percentum on the amount of the interest paid by any railroad or other company, coupons, dividends or profits of any such company, the profits being such as were "carried to the account of any fund or used for construction." Mr. Justice Miller says of this tax: "The section is a part of the system of taxing income, earnings and profits adopted during the late war;" and says that the Act evidently contemplates these profits were to be disposed of in four ways—distributed to the stockholders, used in construction, paid out for interest, or carried to a reserve or other fund.

Mich. Central R. R. Co. v. Slack, 100 U. S. 595.

Under this Act, the Circuit Court of the Southern District of Ohio held that items charged for depreciation of assets could not be properly charged to expenses and deducted from the profits earned during the period and used in construction or carried to the credit of any fund.

U. S. v. L. M. C. & X. R. Co., 1 Fed. 700.

In that particular case, $184,395.06 had been carried to the debit of profit and loss.

"Of the sum so charged up, one item of $51,155.44 was for loss and depreciation on book accounts and other choses in action acquired by the company prior to July 1, 1864, and which had been standing on the books until 1869 at their par value; another item of $22,000 was for the depreciation in the value of bonds purchased after July 1, 1864; another item of $106,014.62 was for the depreciation in the value of what was known as the "Street connection track," and another item for $5,225.00 was for losses on a purchase in 1867 of shares of capital stock in a cotton-press company."

The Supreme Court, through Mr. Justice Waite, referring to the case last cited, held that the tax was put on profits, which meant the excess of the aggregate of gains over the aggregate of losses, and says:

"The Court has found that between July 1, 1864, and November 30, 1869, earnings to the amount of $168,707.22 had been used for construction or carried to the account of some fund, but it has also found that, between the same dates, the company lost $22,000 by depreciation in its investment in bonds, and $5,225.00 by depreciation in the stock of a cotton press company. In the view we take of the law, these sums should have been deducted from the earnings as ascertained before fixing the amount of profits on which the tax was to be paid. It is not stated with certainty in the finding at what dates the losses actually occurred which are represented by the items of $51,155.44, depreciation in the value of book accounts and choses in action, and $106,014.62, depreciation in the value of the street connection track. For this reason, we are unable to decide whether these losses or any part of them should be deduced."

Little Miami, etc., R. R. Co. v. U. S., 108 U. S. 277.

In other words, under an Act which contemplated the taxation of profits which are distributed to the stockholders, used in construction, paid out for interest or carried to a reserve or other fund, a depreciation for the wear and tear of a railroad which has been charged to profit and loss and carried in that fund is not taxed.

The English courts have long recognized that wear and tear was an expense properly chargeable to income, and that losses incurred in trade are not chargeable to capital, but to income. It is interesting to follow these decisions. In early railroad cases the right to deduct for wear and tear beyond the annual repairs had been fully recognized.

Reg. v. Great Western R'y, 15 Q. B. 379, 1085.
Reg. v. Midland Railway, 15 Q. B. 352.
Reg. v. L. B. & S. C. R'y, 15 Q B. 313.
Reg. v. Great Western Ry., 6 Q. B. 179.
Reg. v. Grand Junction R'y, 4 Q. B. 18.

But in a long course of decisions it has been settled that under the Income Tax Act, so far as wasting leases or wasting capital,

where the enterprise contemplated the wasting, this loss could not be deducted from income, the tax being upon the net receipts and not upon the net profits.

The cases are discussed in the recent case of *Alianza Company v. Bell*, L. R. (1905), 1 K. B. 184, which was of an English company owning a large tract of nitrate grounds in Chile. The upper stratum consisted of a substance called "caliche." This was loosened by explosives, dug up, carted and carried away, and the company asked to deduct from their profits and gains a sum representing the cost price to them of the caliche consumed in the year's working. The commissioners, whose decision was affirmed by Channel J., 2 K. B. 666, looked upon the claim as concluded by the cases which forbade deduction for waste subject matter, such as coal mines, and denied the claim that a distinction could be made in principle, on the ground that this was raw material acquired and used in manufacture, the material being subsequently utilized in the production of nitrate and iodine. The court held that the case fell under Schedule D, and in delivering the opinion in the Court of Appeals, Collins, M. R., says:

"The provisions of Schedule D. first case, rule 3, are as follows: 'In estimating the balance of profits and gains chargeable under Schedule D. or for the purpose of assessing the duty therein, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure or concern, nor for any sum expended for the supply or repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure or concern, beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made * * * nor on account of any capital withdrawn therefrom, nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure or concern nor for any capital employed in improvement of premises occupied for the purposes of such trade, man-

ufacture, adventure or concern. * * * The cases for which the contention for the appellants is concluded are *Addie v. Solicitor of Inland Revenue*, 2 R. 431; *Knowles v. McAdam*, 3 Ex. d. 23; and *Coltness Iron Co. v. Black*, 6 App. Cas. 315; the first and last decided in Scotland, and the second in England. They are all reported in volume one of the Tax Cases. The first and third raised the question of deduction claimed for the cost of sinking pits; the second for exhaustion of coals. In the English case it was held in the Exchequer Division that a deduction for exhaustion of coal might be made; in Scotch cases, the first decided before, and the second after, the English case, the opposite view was taken, and the deduction for pit sinking was disallowed. The last case, *Coltness Iron Co. v. Black*, 6 App. Cas. 315, was taken to the House of Lords where the Scotch decisions were approved and the English decision overruled. They were all treated as involving the same question. Thus barely stated, they conclude the case for the appellants."

In *Gillat v. Colquhoun*, a case under Schedule D., in which a deduction was claimed in respect of the depreciation in value of a leasehold interest by effluxion of time, A. L. Smith, J., said:

"It seems to me also that in the case of *Coltness Iron Co. v. Black*, which, as was pointed out by Mr. Grantham, was with regard to mining under Schedule A. the learned law Lords who decided that case undoubtedly laid down that which seems to be applicable to Schedule D. as to Schedule A.; namely, that diminishing capital or exhausted capital cannot be brought into your profits and gains when making out your accounts, either under Schedule D. or Schedule A."

"As pointed out by Channel, J., the question in these cases is, not whether the deduction might be made in a theoretically perfect balance sheet, but whether it is a deduction permitted by the Act. For the reasons I have given, I regard this question as concluded by authority, and therefore, it is unnecessary to examine it once again ab initio. The judgment of Channel, J., must be affirmed."

Stirling, L. J.: "The company claims to be entitled so to do on the ground that such cost is an expense 'wholly and exclusively laid out or expended for the purpose of such trade' within the meaning of the first rule applicable to the first and second cases under Schedule D. Prima facie the claim appears to be reasonable, for such an expense ought certainly to be deducted by a prudent trader from his gross receipts before he arrives at the amount of his profits for any particular period. But the

answer on behalf of the Crown is that, however this may be, the deduction in question is forbidden by the terms of the Income Tax Act itself, and reference is made to the third rule applicable to the first case under Schedule D."

(Here he cites the rule under Schedule D. above cited, and also from Section 159.)

"It is clear from these enactments (as has been repeatedly pointed out) that the law does not permit, as regards such assessments, all deductions which a prudent trader would make in ascertaining his own profits."

"It is said that the Alianza Company is entitled to apply capital in payment of dividends, and the case *Lee v. Neuchatel Asphalte Co.* (1887), 41 Ch. D. 1, was referred to. I do not think it necessary to discuss the vexed question whether capital can be lawfully applied in payment of dividends, and, if so, in what circumstances. It is sufficient to say that I am not satisfied that such capital (if any) may be lawfully paid away by a company to its shareholders in the shape of dividends, would be regarded by the Legislature as an unfit subject for assessment to income tax, or would not fall within the prohibited deductions in respect of 'capital withdrawn' or sums 'employed or intended to be employed as capital.' For these reasons I think the appeal fails and ought to be dismissed."

The case referred to by Stirling, L. J., was a case of wasting property, and involved the right to declare dividends without setting apart a sinking fund to meet depreciation for the value of the wasting property. Stirling, J., in the Exchequer, upheld the right to declare the dividends, and the opinion was sustained by the Court of Appeals, where Cotton, L. J., discussing two cases to which we have referred says:

"Reference was made to two decisions of the Master of the Rolls, which I think are to be explained so as in no way to conflict with the decision of Mr. Justice Stirling in his action, *Davison v. Gillies*, 16 Ch. D. 347, and *Dent v. London Tramways Co.*, 16 Ch. D. 344. Those two decisions are entirely consistent with one another and entirely depend upon the directions contained in the articles of association, not on the general law. In *Davison v. Gillies* there was in the article a direction that profits should be ascertained after making a provision for the reparation of the tramway, and the Master of the Rolls said, when profits are to be divided by the directors it must mean

the net profits, and that no dividend could be declared until provision had been made for the depreciation in the tramway and in the plant of the company. In *Dent v. London Tramways Company*, 16 Ch. O. 344, which was the case where preference shareholders were to have their dividend for each year paid to them out of the profits of that year only, what he held was: that they were entitled to be paid out of the profits of the year after setting aside sufficient for the maintenance of the tramway during that year only; and, therefore, he directed that provision should be made out of the profits of the year, not for the entire depreciation from the neglect to repair the tramway; but for the depreciation attributable for that year."

Lee v Neuchatel Asphalte Co., L. R. Ch. D. Vol. 41, p. 1.

Whether under this same section (Schedule D) depreciation would ultimately have been allowed where it was an expense of operation, is not clear. It was denied in the case of *Forder v. Handyside* in the Exchequer Div. L. R. (1876), Ex. Div. Vol. 1, p. 233, although Huddleston, B., says that the sum sought to be deducted "is a sum which a prudent person would put by for the purpose of meeting what might be called the expense of renewal." But the court held that under the third rule the amount could not be deducted, and that this was made imperative by the 159th section. In 1878 (41, 42, Viet., Chapter 15, Section 12) the act was amended by providing that the commissioner should allow such "deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used."

In the Cunard Co. case, where the question before the court was whether repairs being erected on an average of a period of three years' depreciation should be estimated the same way, this was denied, Kennedy, J., saying:

"What the Commissioners have to do is to estimate according to what is just and reasonable, looking to the business to be assessed and its nature, the amount which ought to be deducted

for depreciation during the year in progress when the assessment is made. It has to be an estimate."

Cunard S. S. Co. v. Coulson (1899), 1 Q. B. Vol. 1, p. 865.

It is by no means clear that the House of Lords would have sustained *Forder v. Handyside,* for in the latter case of the Coltness Iron Co. a wasting capital, where iron pits were held non-deductible, on the general ground that, whilst in the case of a trader his net income was taxed, in the case of mines or other cases of wasting capital what was taxed was the property estimated by the amount realized from the mining operations, in the House of Lords, Earl Cairns says:

"It may be proper for a trader or for a trading company to perform in his or their books an operation of this kind every year, in order to judge of the sum that can in that year be safely taken out of the trade and spent as trade profits."

Lord Pensance says that there is a wide difference between the merchant or trader, who is only taxed upon the profits which he realized annually in his trade; whereas, the owner of a mine is taxed in respect to that mine, estimated on what he realized out of it each year.

Lord Blackburn approved the definition of McCulloch that capital wasted and used in an undertaking must be replaced before profits can be estimated, and if the produce is insufficient to replace the capital exhausted a loss has been incurred; definitions on the same grounds laid down by Lord Penzance in the case of a mine; and in the course of his opinion says:

"In *Forder v. Handyside* the Exchequer Division came to a decision as to repairs, estimated but not actually incurred, which, whether it was right or wrong, is no longer, since 41 Viet., c. 15, s. 12, to apply. And as there is no question in the case at bar as to repairs, it is unnecessary to inquire whether it was right or wrong."

Coltness Iron Co. v. Black, L. R. 6 App. Cas. 315.

The question of obsolescence has been before the Scottish courts and it has been held that depreciation caused by ships of a better construction being built cannot be allowed.

Burnley Steamship Co. v. Aiken (1894), 21 Rettie 965; Ct. of Sess. (Sc.) (1896), W. N. 115.

And it has also been held, in case of a steamship company, that the deductions for depreciation cannot be capitalized; that is, treated as an annuity.

Leith, Hull & Hamburg Steampacket Co. v. Inland Revenue (1899), 1 Frazer 1117; Ct. of Sess. (Sc.) (1900) W. N. 210.

That the rule laid down by the Hawaiian court in this case is erroneous in principle and that amounts expended in any one year for equipment and improvement, the use of which extends over several years, should not be charged to the year in which the expenditure of money is made, but to the year in which the expenditure of material has been made, has been settled subsequently to that decision by the Supreme Court of the United States in the Illinois Central R. R. case. In that case the question was the reasonableness of the rates; but to determine this it was necessary to determine operating expenses, and it was held proper to charge against operating expenses, not the amount of cash expenditures for replacements either of permanent improvement or of equipment, but that part which went into the use. In deciding the case, Mr. Justice McKenna says:

"The Commission finds that the net and gross earnings of the appellant have grown from year to year, and also that what they have reported as operating expenses have also grown. But in these operating expenses there were included 'expenditures for real estate, right of way, tunnels, bridges, and other strictly permanent improvements, and also for equipment, such as locomotives and cars.' The Commission expressed the opinion that such expenditures should not be charged to a single year, but 'should be, so far as practicable and so far as rates exacted from

the public are concerned, 'projected proportionately over the future.'' And it was said: 'If these large amounts are deducted from the annual operating expenses reported by the defendants (appellants) it will be found that the percentage of operating expenses to earnings has in some extent diminished and in others increased to no material extent.' The exact effect of the differences of view between appellants and the Commissioners as to operating expenses there is no test, but it cannot be said, even if the Commission was wrong as to such expenses, that error in its ultimate conclusion is demonstrated or that the correctness of the conclusion is made so doubtful as to justify a reversal. The findings show that the old rates were profitable and that dividends were declared even when permanent improvements and equipment were charged to operating expenses. But may they be so charged? Appellants contend that the answer should be so obviously in the affirmative that it should be made an axiom in transportation. On principle, it would seem as if the answer should be otherwise. It would seem as if expenditures for additions to construction and equipment as expenditures for original construction and equipment should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year."

Illinois Central Railway Co. v. Interstate Commerce Commission, 206 U. S. 441.

Then, discussing the *Union Pacific Railway v. United States*, 99 U. S. 402, and differentiating that case on the ground that the interest to the government, and the road as well, demanded a different construction of that Act, the learned Justice concludes:

"The elements of that value may be many and complex, not always determinable, as we have seen, with mathematical accuracy, but, we think, it is clear that instrumentalities which are to be used for years should not be paid for by the revenues of a day or a year; and this is the principle of returns upon capital which exists in durable shape."

Illinois Central Railway Co. v. Interstate Commerce Commission, ubi supra, p. 463.

"It was certainly not the intention of the parties that the defendant should make a donation by any expenditure in business," said Mr. Justice Swane in a case settling the net profits of a partnership; and the language is equally applicable in determining the meaning of a statute seeking to ascertain the net profits of a business.

Foster v. Goddard, 1 Black 506; 17 L. Ed. 228.

"INCURRED."

"Incurred" means "brought on."

Deyo v. Stewart, 4 Denio 101.

Our contention is that, as a part of the necessary expenses of the operation of the road, this "wear and tear" must be estimated and included. That it is fairly estimated is not questioned, and without this item the amount of gain or profit realized cannot be arrived at; without it, it would be over-estimated in a year where expenditures for replacements are not made, and under-estimated in a year in which large replacements were made.

"LOSS."

The Supreme Court of Hawaii has determined what is a "loss" under the Income Tax Law.

"The word 'loss' and its plural 'losses' used in the Statute is not a technical term of art or trade, but a simple word in common use. There is nothing to indicate that these words are used in the Statute to express any other than their ordinary meaning. The dictionary definition of the noun 'loss' is 'failure to ho[illegible] keep or preserve what one has had in possession; deprivation [illegible] that which one had had; as the loss of money by gaming; loss of health or reputation; loss of children; opposed to gain.' (Cent. Dic.) The central idea in each of these definitions is voluntary parting with a thing. If the property is lost it has passed from the control and out of the possession of the loser. No one can lose property and still have it in his possession and be conscious of the fact that he has it."

Haw. Com. & S. Co. v. Tax Assessor, 14 Haw. 601.
In Re Assessment of Taxes, 15 Haw. 502.

The latter case was decided on the authority of a decision of the Privy Council construing the New Brunswick Act taxing income, without providing for any deduction, where Sir Montague E. Smith said, in speaking of the word "income" used in the Act:

"Surely every banker or trader properly conducting his affairs would in the first instance at least charge losses to income; that is, in ascertaining the income of the year's business, would set the losses of the year against his profits. To have profits or income, and to charge losses to capital, would be to enter upon a road leading very directly to financial ruin. 'Income' in this case was defined by the Court to mean the 'annual profit or gain arising to any person from trade.'"

Lawless v. Sullivan, 6 App. Cas. 373, 382.

And the Hawaiian Court so held:

"In general it may be said that, in our opinion, losses of capital, at least working capital used in business, as distinguished from ordinary investments, may be deducted under certain circumstances, but that only such losses may be deducted as have occurred within the year in question. The latter proposition seems to be clear. The other proposition is not as clear as it might be, but it receives more of less support in decisions elsewhere under statutes that do not go as far as ours in this direction. Our statute is extremely broad as compared with most other statutes, even including the Federal statute of 1894, which ours most resembles, but which was held unconstitutional, with the result that we have not the benefit of decisions construing it. Ours allows deductions, among other things, of 'all losses actually sustained during the year incurred in trade or arising from losses by fire not covered by insurance, or losses otherwise actually incurred.'"

Laws of 1901, Act 20, Sec. 4. That losses of capital may be deducted under certain circumstances seems to be assumed in *Haw. Com. & Sug. Co. v. Assessor*, 14 Haw. 601.

See also the decisions on the motion for rehearing, 14 Haw. 687; also *Little Miami & Colum. & Zenia R. Co. v. U. S.*, 108 U. S. 277, *U. S. v. Meyer*, Deady 127; *Lawless v. Sullivan*,

L. R. 6 App. Cas. 373; *Reid's Brewery Co. v. Male* (1891), 2 A. C. 1.

In Re Assessment of Taxes, ubi supra.

The reasoning of the court in the case at bar is not consistent with principle, with the language of the statute, with the terms of the Rapid Transit franchise, nor with the decisions rendered earlier and subsequently by that court. The reasons therein given by Chief Justice Frear are:

"Such depreciation does not come under 'losses actually sustained or otherwise actually incurred during the year,' within the meaning of the statute on income taxes. If this loss may be deducted at all, it is when the repairs are made or the property replaced by substituting new property for it. It would then come within the provision of the statute allowing a deduction of 'necessary expenses actually incurred,' etc. This ruling is required by implication at least from the reasoning of the court in the *Hawaiian Commercial* case, 14 Haw. 601, and, on rehearing 687, and by the case there cited from the United States Supreme Court, *Grant v. Hartford & N. H. Ry. Co.*, 93 U. S. 225."

In re Assessment of Income Taxes, Honolulu Rapid Transit & Land Co., 18 Haw. 15. (Tr. p. 29, folio 45.)

Four points are made: That the depreciation does not come under losses actually sustained or otherwise actually incurred; that, if deductible, it would be deductible when repairs are made or new property substituted; that the latter would constitute an expense, and that the ruling is required by implication by the Hawaiian Commercial case and the Hartford Bridge case.

The first proposition is in conflict with the language of the same judge in the case just cited in 15 Haw., because the loss was incurred and is a loss of working capital used in the business which occurred within the year.

In the second place, the loss or gain is not made when repairs are made or new property substituted. That is only a substitution of property for money. It is neither a loss nor a gain.

The loss occurred when the property was used up in and doing the business.

In the third place, the court entirely overlooks the proposition that an expense actually incurred need not be of money. The loss in the case of the note, the bad debt, the stock, is not of money. The money was expended in a previous year; the loss incurred in the year in question.

In the fourth place, there is nothing in the reasoning of the two cases cited to sustain the proposition. The Hawaiian Commercial case is a case of obsolescence and not of wear and tear. The deduction was not claimed as an expense; but the depreciation in value of the old mill was claimed as a loss. The Bridge case contains nothing to show that the loss of the old bridge had not occurred during the taxation period. The language we have already quoted from the opinion of Mr. Justice Bradley sustains our proposition, and not the implication drawn from it.

In the Hartford Bridge case, counsel for the government argued that the intention of the internal revenue act was to tax all gains, whether divided or undivided, and therefore that an investment in a bridge was an accretion. Counsel for the taxpayer cited the cases in the Queen's Bench, which we have cited, that a percentage should be allowed beyond the ordinary annual repairs for depreciation, and the court found that the amount charged to current expenses "was not greater than the proper, ordinary expenses and the *depreciation* of the entire property, and that therefore the whole tax had been paid." Mr. Justice Bradley says:

"We do not see why this was not a full compliance with the law. The object of the law was to impose a tax on net income, or profits, only; and that cannot be regarded as net income, or profits, which is required and *expended* to keep the property up in its usual condition proper for operation."

Grant v. Hartford & New Haven R. R. Co., 93 U. S. 225.

On the other hand, an advance in value is not "gains, profits or income"; Mr. Justice Field saying that "mere advance in value in no sense constitutes the gains, profits or income specified by the statute."

Gray v. Darlington, 15 Wall. 63.

If it be said that the amount must necessarily be an approximation, our answer is: (1) Every tax must be a matter of estimation, or, in other words, an approximation, and such is the statutory provision (Sec. 1280); (2) it is stipulated in this case that the amount is correct; and (3) the system of approximation in income tax has received the approval of the Hawaiian court, where that approximation is close.

In Re Assessment of Taxes, Laupahoehoe Sugar Co. et al., 18 Haw. 206.

In a decision which has been rendered since the decision sought to be reviewed by the Hawaiian court *In Re Assessment of Taxes*, Ewa Plantation, Dec. 23, 1907, 18 Haw. 530, the decision under review is supported, on the ground that in the United States, in contradistinction to Great Britain, the legislative tendency seems to have been against the allowance of estimated depreciation; and the court, after citing the Little Miami case and the Hartford Bridge case, and conceding that in these cases depreciation was allowed, contends that the Income Tax Law of 1894, upon which the Hawaiian act was modeled, construed with the Act of March 2, 1867, c. 13, and of June 14, 1870, Sec. 9, shows that the intent of the latest statute was to confine deductions to actual cash replacements; drawing this deduction from the language confining necessary expenses to those "actually incurred," and the clause expressly excluding "all estimated depreciation of values and losses within the year on sales of real estate within two years." The inference seems to us a violent one, particularly as the court has evidently assumed

that there is some virtue in the word "depreciation," when in fact the context shows that it is "estimated depreciation of values" and that, too, "of real estate purchased within two years."

The court has been led into a curious error, by what they call the somewhat "confusing reference to losses on real estate." The clause was put in because of the companion clause relating to the profits on sales of real estate within two years inserted for the first time in the Statute of 1867.

The whole matter is fully discussed; and that the purchase and sale of real estate and the estimation of gains and profits thereon stands on a different footing is shown in *Gray v. Darlington*, hitherto cited.

II.

THE FRANCHISE, RATIFIED BY CONGRESS AND APPROVED BY THE PRESIDENT, IS AN IRREVOCABLE CONTRACT, PROVIDES IN DEFINITE TERMS FOR THE DIVISION OF THE REVENUE OF THE COMPANY BETWEEN THE TERRITORY AND THE COMPANY, AND FIXES THE CHARGES DEDUCTIBLE FROM THE INCOME, WHICH CHARGES INCLUDE NOT ONLY THE WEAR AND TEAR AS AN EXPENSE OF OPERATION, BUT DIVIDENDS AND A SINKING FUND COMPUTED AT FIVE PER CENT. ON THE RECORD DEBT AND CAPITAL.

The Act of July 7, 1898, ratified by the Organic Act and the approval of the President of the United States, constitutes a contract between the Territory of Hawaii and the Honolulu Rapid Transit and Land Company, which is irrevocable and cannot be modified, excepting under the exercise of the police powers and as reserved in the instrument itself. By that act it is provided what sums shall be a charge upon the income and

how the income shall be divided between the company and the Territory of Hawaii, which is its partner in the enterprise.

The scheme of the act is based on the theory that the Territory is an interested party, having a reversionary interest in the franchise, and a present interest in its profits. For this reason, the location of the road is carefully guarded.

In Section 2 the consent of the Executive Council to right-of-way must be obtained in several instances in portions of the route set forth in the franchise, and with the consent of the majority of the property owners and the Executive Council, the right is given to lay upon any street.

In Section 3 the consent and approval of the Executive Council is required to the use of other motive power than electricity or compressed air.

By Section 4 the location in the streets is to be directed by the Minister of the Interior; the cars and their equipment are to be approved by the Executive Council; the style of rail is to be approved by the Minister of the Interior; guard wires are also to be approved by him, as well as the repairing of the streets, and all other matters and things required by the section.

By Section 9 the rate for transportation outside of certain limits is to be fixed, subject to the approval of the Executive Council; and by paragraph 4 of the same section the regulations for the maintenance and operation of the road are to be by the consent and approval of the Executive Council, while, if the road fails to make such rules and regulations, the Minister of the Interior with the approval of the Council may make them. The latter can also change such rules.

By Section 29 the rights and privileges are granted subject to such terms, conditions and restrictions as may be imposed by law in relation to constructing and maintaining street railways in the District of Honolulu; the tracks must conform to the grade furnished by the Minister of the Interior, and any

alteration must be with the written consent of the Executive Council; changes must be made to conform with the notice of the Minister of the Interior.

"Section 33. The entire plant, operation, books and accounts of the said association and others shall from time to time be subject to the inspection of the Minister of the Interior or other officer appointed by him for the purrpose."

By Section 9 it is provided;

"Policemen, firemen and letter carriers, when on duty, and in uniform, shall be entitled to free passage over any of the lines of said association and others."

"Section 35. The said association and others shall provide such receptacles upon their street cars as shall be approved by the Postmaster-General for the conveyance free of charge of all letters."

These are the provisions which subject the proposed company to the control, inspection and service of the Territory. By provisions of law to which we will hereafter refer, the portion of the revenue to be diverted to the benefit of the Territory is set forth. In return for this is given the right to lay, maintain and operate a railroad in the streets of Honolulu, and by Section 34 this right is to be transferred to a corporation with a capital stock of not less than two hundred thousand dollars, to whom the rights shall be assigned.

What the corporation is to get out of the franchise is defined by Sections 37 and 17. The former makes it lawful to increase the capital stock from the two hundred thousand dollars which is provided to an amount which will represent the actual cost of the property of the railway, and not over twenty-five per cent. of the cost in addition. While Section 17 is a complete scheme for the apportionment of the income to be derived from the operation of the road, declaring all charges to be made against it, and their order, the residue after these charges are provided to be equally divided between the government and

the corporation. The section declares then "the following charges shall be *lawful* upon the income of said railway:

"1st. The expense of operating, repairs, renewals, extensions, interest, and every other cost and charge properly or necessarily connected with the maintenance and operation of said railway."

"2nd. Dividends to be paid to the stockholders not to exceed eight per cent. on the par value of the stock issued."

"3rd. A sinking fund may be created for the redemption of any bond which may be issued or other record debt and the capital upon the expiration of the franchise. Provided, however, that the amount placed to the credit of such sinking fund annually, shall not exceed in amount, such a sum with interest computed at five per cent. per annum, compounded, as will principal and interest combined, at maturity, equal the par value of the bonds, record and capital debt aforesaid."

"4th. The excess of income shall be divided equally between the government of the Republic of Hawaii and the stockholders of said corporation."

"5th. A quarterly account or trial balance of the corporation shall be rendered by the corporation to the Minister of the Interior from the beginning of the actual construction of the railway."

(a) This section makes it clear that the appellant is entitled to charge against income, not only the expense of operating and repairs, but also every other cost or charge properly or necessarily connected with the maintenance and operation of the railway; and the agreement in the case at bar is that the charge is the correct amount of an expense, viz., the wear and tear on the system, apart from the repairs. We think that under this provision we are entitled to deduct the charge.

The fact that extensions and renewals are also mentioned as items which can be deducted does not militate against this argument, because, if these items are to be deducted, then the evidence shows that item 10, the amount carried to the account of any fund or used for construction or enlargement of plant, $65,306.17, much more than cover the amount involved in this appeal of $23,244.

Again, the reason of the deduction is apparent. These extensions and renewals go to the benefit of the Territory at the expiration of the franchise, and are properly taken out of income. We cannot be charged with income of which we do not get the benefit. The basic reason is that this is a contract between the Territory and the corporation, carefully drawn, which determines the rights of either party, and the Territory is not presumed to come in under the guise of taxation and change the contract; nor can it, as a matter of constitutional right, change the existing contract under the guise of taxation.

Commonwealth v. P. & E. R. Co., 164 Pa. St. 252; 30 Atl. 145.

(b) We are entitled, as a matter of right, to deduct a sinking fund for the redemption of the bonds and capital, upon the expiration of the franchise, to be computed at five per cent. per annum, which would amount to double the amount of the deduction claimed. There was actually set aside for the bonds, as appears in the memoranda on file, the sum of $20,000; but the amount which we are entitled to deduct is five per cent. upon the capital and bonds, discounted for thirty years, which would amount to more than $40,000. It is entirely immaterial whether we have set this aside as a matter of book-keeping or not. The mere fact that we have not set it aside does not entitle the government to charge for income which has not been set aside as a matter of book-keeping. What is taxed here is the net gains, and net profits; not what appears on the books.

The requirements for the sinking fund under Section 17 are annually $45,510.68, and, although this item is not put upon the returns, it can be claimed without returning.

"A failure to make return and claim of the exemption to the assessor is not a waiver of the right to demand the benefit of the statute."

In Re Assessment of Taxes, Oahu College, 15 Haw. 18.

See also opinion of Justices, 5 Mete. 596.

Our rights are fixed by the statute, but they have long been recognized by authority.

We admit that the items of depreciation and the item for sinking fund cover substantially the same ground, although depreciation recognizes the fact that some of the property will not last as long as the life of the franchise; and the sinking fund makes no calculation for this, but assumes that the life of the property will be equal to the length of the franchise. This is immaterial, for, there being no income to tax, it is not material whether the deduction is on one ground or the other. Either is sufficient.

It should be borne in mind, in considering this tax, that the property of the company consists largely of a contract with the Government, which is wasting year by year. How it presents itself to a business man is well expressed by the testimony of the President of the road, Mr. Peck:

"The Legislature gave us this franchise. We put in a certain amount of capital which we took from our shareholders; we add to it contributions from the bondholders and we build a railroad with it. The whole idea of the Legislature is that we shall at the end of the franchise period, we shall have such a right to deduct from our gross income from year to year as we may be able to provide. There is enough income to do it after paying our necessary expenses, enough so that at the end of the period we shall have a reserve fund to wipe out our capital and our bonded debt, and together with the value of the junk that is left so that we will get our investment back, and have in the meantime an income on our investment which shall not exceed 8% on the cost plus 25% added thereto, plus 50% of the expense.

"Now then, when it comes to deduction from our gross income we have two laws which affect us. We have the Income Tax law and the law known as the Rapid Transit Franchise law, Chapter 69 of the Laws of '98. Now we propose in our contention with the Government to make such deductions from our gross income as the law allows us to make. In making this return we found no place there whatsoever for sinking fund

deduction; neither did we find a line which would allow us to put other deductions otherwise than those enumerated above. The only thing we found there was an item which said—'Losses otherwise actually incurred.' Now, then, what is depreciation but a loss of capital, more or less tangible and hard to put your finger on, but which you know is there because at the end of the time you have a handful of junk worth from 5¢ to 10¢ on the dollar on your investment. All you need to look at is the outcome of the Pacific Heights and the Hawaiian Tramways Company to see what the tangible effects were worth even after a portion of the life of the franchise was gone. Now in this $40,000 we have charged off as depreciation, $40,935.43, it is charged in our books by items amounting dollar for dollar and cent for cent to $40,935.43. We have made no charge in our books thus far for a capital sinking fund, not a dollar has been charged up, but as between us and the Government and between us and the tax gatherer we have the right to make that account, whether it is made on our books or claimed here before this Court. Mr. Prosser said that he contended that it was the right of the Government if they found any additional facts to throw aside the assessment that they made and go ahead *de novo*. I am speaking as a layman; but we have that right as between us and the Government, and how is it going to be taken away because our bookkeeper up on Alapai street did not put it in expressly as capital sinking fund but depreciation."

(Tr. pp. 13 and 14, folios 16 and 17.)

It is inconsistent with the terms of the franchise that its property should be doubly taxed, which is against the well-recognized policy of Hawaii.

Kekaha Sugar Co. v. Hawaiian Government, 8 Haw. 293.

Alexander v. Fornander, 6 Haw. 322.

Haiku Sugar Co. v. Fornander, 6 Haw. 532.

Castle v. Luce, 4 Haw. 63.

McBryde v. Kala, 6 Haw. 529.

Brewer v. Luce, 6 Haw. 554.

III.

UNDER THE CONTRACT NO TAXES CAN BE LEVIED EXCEPTING A TAX UPON THE COMPLETED PORTION OF THE RAILROAD, AND A LICENSE TAX.

The contract provides a complete scheme for the division of the income between the Territory and the corporation, and what charges shall be lawful. The charge for taxes is specifically provided in the contract, viz.: License taxes at ten dollars per annum on each passenger car (Sec. 31). By Section 30 it is provided that "as fast as completed and equipped the completed and equipped portions shall become liable to such taxation," viz.: Internal taxation.

Section 1 declares that the "railway" means the "rails, tracks, roadway." As "railway" is defined to be the physical structure and not an intangible right, the "completed and equipped portions * * * liable to taxation" are portions of the physical structure; so that the taxation to which the corporation becomes liable is a tax on the physical structure of the road, thus creating a charge on the income.

At the time of the granting of the franchise there was no income tax, the Income Tax Law of 1896 having been declared unconstitutional and void.

Campbell v. Shaw, 11 Haw. 112. (1897.)

At that time, as now, the law recognized the distinction between the taxation of tangible property to be "assessed separately as to each item thereof at its full value," and where "several classes or kinds or parcels of real or personal property respectively are combined and made the basis of an enterprise for profit, the combined property forming such basis of such enterprise for profit shall be assessed as a whole on its fair and reasonable aggregate value." As the former method is pre-

scribed, the other is precluded. Clearly, then, another and new tax laid upon income from the use would not be permissible. Particularly is this true, since the franchise granted here is a federal franchise and not subject to taxation. The Income Tax Law of Hawaii has been held, following the decision of this court in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, to be, in substance and effect, a tax on the property producing the income.

Oahu Railway & Land Co. v. Pratt, 14 Haw. 126.

In this case the entire income is earned by the exercise of the franchise, and, the franchise being exempt, the income from it is therefore exempt; and this has been held by the Hawaiian court.

Russell v. Tax Assessor, 11 Haw. 689.
Oahu Railway & Land Co. v. Pratt, ubi supra.

The contract providing for a charge of a tax on the tangible property, it would be inconsistent with the contract to allow a tax upon the income, for the division of which the contract in express terms provided. It would be an attempt, by the exercise of the power of taxation, to change the terms of a contract unambiguous in itself providing for a division of the income.

A recent case is in point which holds that where the whole contract shows the desire of the state that private individuals should invest their capital on the faith of the contract, the court would not indulge any ambiguity by means of which the state could assert a distinction in the form of taxation and impose a license where the capital stock was exempted from any tax.

Citizens' Bank v. Parker, 192 U. S. 73.
Stein v. Mayor of Mobile, 49 Ala. 362.

IV.

THE INCOME TAX LAW, AS CONSTRUED BY THE SUPREME COURT OF HAWAII, IMPAIRS THE OBLIGATION OF A CONTRACT, AND DEPRIVES THE CORPORATION OF PROPERTY WITHOUT DUE PROCESS OF LAW AND WITHOUT JUST COMPENSATION.

The exercise of the power of taxation changes the terms of a contract unambiguous in itself. We have so thoroughly discussed this in our brief filed in No. 234 that we refrain from repeating much of the discussion.

Whether the income tax law be construed as a franchise tax or a tax on property, in either event such a tax cannot be levied, since the franchise of the company is a Federal franchise. The Act was passed on the same day as the resolution annexing the Hawaiian Islands; but it was ratified and approved by the Organic Act and the approval of the President of the United States, and it has therefore passed out of the domain of Territorial legislation and has become a Federal statute, or, if not a Federal statute, a Federal right. The character of the franchise itself shows that it was a public and a Federal institution. By Section 9, paragraph 4, it is provided: "Policemen, firemen and letter carriers, when on duty, and in uniform, shall be entitled to free passage over any of the lines of said association and others."

By Section 11 a right-of-way is given in the streets in precedence to all except the fire engines and the police authorities in case of emergency. By Section 17 the excess of income is divided between the Territory, the creation of Congress, and the stockholders. And Section 35 provides that:

"The said association and others shall provide such receptacles upon their street cars as shall be approved by the Postmaster-General for the conveyance free of charge of all letters."

In other words, it is a part of the postal system of the United States Government; an arm of that power under which such great extensions of Federal operations have been made.

A franchise granted by the United States cannot be taxed by a state; nor can its operation be the subject of taxation.

California v. C. P. R. Co., 127 U. S. 1.

Nor can this be reached indirectly by a license tax for carrying persons or freight for hire by means of railroad cars. Both a franchise and its use are beyond the taxing power.

San Benito County v. S. P. R. Co., 77 Cal. 518.

Nor can the Western Union Telegraph Company, a state corporation, be taxed for rights exercised under authority from Congress.

Western Union Telegraph Co. v. Massachusetts, 127 U. S. 530.

Such a tax is not only derogatory to the dignity, but subservient of the power, of the Government and repugnant to its paramount authority.

Judson on Taxation, Section 31.

California v. C. P. R. Co., ubi supra.

The income tax law has been held by this court, following the United States Supreme Court, to be a tax on the property producing the income and not on the franchise.

Oahu Railway & Land Co. v. Pratt, ubi supra.

Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; 158 U. S. 601.

The entire income in this case, whether it is a tax on the franchise or on the property, is a tax on the product of the use of the franchise, which is not subject to Territorial taxation. Clearly, then, one of two conclusions must follow: The Act is unconstitutional, as seeking to tax a Federal franchise; or else the tax on this corporation cannot be sustained.

If the Pennsylvania doctrine is to be followed and the tax is held to be a tax on the franchise, *Commonwealth v. New York, etc., R. R. Co.*, 150 Pa. St. 234, then still more clearly the tax cannot be sustained.

V.

IT WAS ERRONEOUS TO HOLD THAT SECTION 17 HAD NO BEARING UPON THE QUESTION ON THE DEDUCTIONS TO BE MADE FOR THE PURPOSES OF TAXATION.

It seems to us that the argument of the court of Hawaii answers itself. That court says that Section 17 was "inserted merely with a view to ascertain in what income the Government should participate." If such was the intention, then to change the proportion of income in which the Government should participate by an Income Tax Law seems to us clearly to change the contract with reference to the income.

Respectfully submitted,

William R. Castle,

David L. Withington,

For the Plaintiff-in-Error.

APPENDIX.

ACT OF THE LEGISLATURE OF THE REPUBLIC OF HAWAII, APPROVED JULY 7, 1898.

SECTION 1. Wherever in this Act the following words occur they shall be held to have the force and meaning herein set forth unless the context clearly indicates otherwise:

"Said Association and others" shall represent and mean Clinton G. Ballentyne, Frederick J. Lowrey, Theodore F. Lansing, James A. Kennedy, Charles S. Desky, Joseph A. Gilman, James F. Morgan, George R. Carter and J. H. Soper, their associates and assigns, or such corporation as may be organized by them, as named in the second Section of this Act.

"Executive Council" shall refer to and mean the Council designated as the Executive Council in the Constitution of the Republic.

"Minister of the Interior" shall refer to and mean the person from time to time acting as the Minister of the Interior as defined in said Constitution, or his lawful successor in said office.

"Railway" shall refer to and mean the rails, tracks, roadway, with its appurtenances, appliances and connections to be placed in streets, roads or places on the Island of Oahu, as by this Act provided, or to such rails, tracks, roadway, etc., of any other corporation as may now be in existence or that may hereafter be laid.

"Honolulu" or "District of Honolulu" shall refer to and mean all of that portion of the Island of Oahu included in the judicial, educational and taxation district, now defined by law as the "District of Honolulu" or "Honolulu District."

RIGHT OF WAY.

SECTION 2. The right is hereby granted to Clinton G. Ballentyne, Frederick J. Lowrey, Theodore F. Lansing, James A. Kennedy, Charles S. Desky, Joseph A. Gilman, James F. Morgan, George R. Carter and J. H. Soper, and to their associates and assigns or to such corporation as may be organized by them, to construct, lay down, maintain and operate for the term of thirty years, after the railway authorized by this Act shall have been commenced, a railway, either single or double track, or partly single and partly double, with such curves, switches, turnouts, poles, wires, underground or overhead conduits, and such other appliances and appurtenances as may from time to time be necessary for the use and operation thereof, shall and upon the following

streets, roads and places, in the District of Honolulu, upon said Island of Oahu, to-wit:

(Here follows names of streets.)

MOTIVE POWER.

SECTION 3. 1st. The said railway shall be operated by electric power, either by overhead or underground wires or by storage batteries, or by such other method as may be an improvement upon either; or by compressed air; or by such other motive power as the said association and others may from time to time elect, subject nevertheless to the prior consent and approval of the Executive Council. Provided, * * *

3rd. The motive power by this Section authorized may be used for all of the purpose of railway traffic, either in the transportation of passengers, mail, freight or otherwise.

CHARGES UPON EARNINGS.

SECTION 17. The following charges shall be lawful upon the income of said railway:

1st. The expense of operating, repairs, renewals, extensions, interest, and every other cost and charge properly or necessarily connected with the maintenance and operation of said railway.

2nd. Dividends may be paid to the stockholders not to exceed eight per cent. on the par value of the stock issued.

3rd. A sinking fund may be created for the redemption of any bond which may be issued or other record debt and the capital upon the expiration of the franchise. Provided, however, that the amount placed to the credit of such sinking fund annually, shall not exceed in amount, such a sum with interest computed at five per cent. per annum, compounded, as will principal and interest combined, at maturity, equal the par value of the bonds, record and capital debt aforesaid.

4th. The excess of income shall be divided equally between the Government of the Republic of Hawaii and the stockholders of said corporation.

5th. A quarterly account or trial balance of the corporation shall be rendered by the corporation to the Ministers of the Interior from the beginning of the actual construction of the railway.

RESERVED RIGHTS AND AUTHORITY AT LAW.

SECTION 29. 1st. Except as by this Act otherwise so provided, the rights and privileges named in Section 2 hereof are granted to the said association and others upon such terms, conditions and restrictions as now are or may hereafter be imposed by the laws of the Republic of Hawaii in relation to the matter of constructing and maintaining street railways in the District

of Honolulu, Island of Oahu, and a strict compliance with such laws is hereby required of the said association and others.

2nd. The right to grade, sewer, pave, macadamize or otherwise improve, alter or repair any or all of the streets, roads or highways above mentioned, and of all other places in said Republic, is reserved to the Government, and may not be alienated or impaired; but any work in carrying out and performing such reserved rights shall be done in such manner as to obstruct or injure the railway hereby authorized as little as possible; but, if such improvement, alteration or work in accordance herewith upon such streets, or roads, necessarily interferes with the grade of such railway, the said railway shall be altered and made to correspond with the improvements, alteration or grade, immediately upon being so required.

3rd. The said association and others, before laying the railway upon any of the streets or roads in the District of Honolulu, shall ascertain the lawful grade of such streets or roads from the Minister of the Interior, who shall furnish the required information within a reasonable time. The tracks of such association and others shall conform to the grades of said streets or roads on which they are laid down as furnished by the Minister of the Interior or other officer duly appointed by him, and the said association and others shall not in any way change or alter the same without the written consent of the Executive Council. And the Hawaiian Government reserves forever the right to change the line and grades of its streets at any time that the public interests demand such changes; and the said association and others, shall, at its own cost, within thirty days, conform to such new lines or grades in constructing its tracks or lines, upon receiving notice in writing from the Minister of the Interior, and such changes shall be made subject to the approval of the Minister of the Interior. And in all cases of street improvements by the Government, the said association and others shall conform to all such improvements, in the kind of pavement and the manner of laying the same, as directed by the Minister of the Interior.

In case of neglect by the said association and others to make such repairs, changes or improvements required of it by this Section, they shall be made by the officers, servants and employees of the Hawaiian Government, and the cost of such repairs, changes or improvements may be recovered by the said Government, from the said association and others.

SECTION 30. All material required by the said association and others to be used for the purpose of this Act, when imported from the United States, and being the product or manufacture of the said United States shall be free of duty, and the property of the said association and others shall not be liable to internal taxation while said railway is under construction, provided that as fast as completed and equipped the completed and equipped portions shall become liable to such taxation.

SECTION 31. Said Railway or Corporation shall pay in annual payments to the Department of the Interior the sum of ten dollars per annum as a license tax upon each passenger car used by it or them, and no greater sum shall be exacted as Car License.

SECTION 32. All orders, permits, or approvals, as provided for in this Act, shall be in writing.

SECTION 33. The entire plant, operation, books and accounts of the said association and others shall from time to time be subject to the inspection of the Minister of the Interior or other officer appointed by him for the purpose.

SECTION 34. None of the rights or privileges enumerated in this Act shall be exercised by the persons forming the association set forth in Section 1, nor by their assigns, until a corporation shall have been duly organized under the laws of this Republic, for the purpose of constructing, operating and maintaining the lines of railway mentioned in this Act, having a capital stock of not less than two hundred thousand dollars and all the said rights and privileges assigned to said corporation without reserve.

SECTION 35. The said association and others shall provide such receptacles upon their street cars as shall be approved by the Postmaster-General for the conveyance free of charge of all letters.

SECTION 36. Whenever the said association and others or any corporation which may have been duly organized under the laws of this Republic for the purpose of constructing, operating and maintaining the lines of railway mentioned in this Act, and as by this Act provided, refuses to do or fails to do or perform or carry out or comply with any act, matter or thing requisite or required to be done under the provisions of this Act and shall continue so to refuse or fail to do or perform or carry out or comply therewith, after due notice by the Minister of the Interior to comply therewith, the Minister of the Interior shall with the consent of the Executive Council, cause proceedings to be instituted before the proper tribunal to have the franchise granted by this Act and all rights and privileges granted hereunder, forfeited and declared null and void.

SECTION 37. It shall not be lawful to increase the capital stock of said corporation, at any time in excess of said two hundred thousand dollars, unless the proposed increase shall when taken with the said original capital stock, represent only the actual cost of the property of the railway, and not over twenty-five per cent. of such cost in addition thereto; such cost may include all expense, of laying tracks and equipping the road for public use, and may also include all subsequent extensions, but no such increase shall be authorized for extensions until they shall be determined upon and authorized by a vote of the corporation.

ACT "TO PROVIDE A GOVERNMENT FOR THE TERRITORY OF HAWAII," APRIL 30, 1900.

(31 Sts. at L. 141 C. 339)

SECTION 73. That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land-commission awards, except, as changed by this Act, shall continue in force until Congress shall otherwise provide. That, subject to the approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii, between the seventh day of July, eighteen hundred and ninety-eight, and the twenty-eighth day of September, eighteen hundred and ninety-nine, are hereby ratified and confirmed. * * *

NO. 4070.

UNITED STATES OF AMERICA,

DEPARTMENT OF STATE.

To all to whom these presents shall come:

I certify that the copy hereto annexed is a true copy of the President's approval of the charter of the Honolulu Rapid Transit & Land Company, of the Island of Oahu, Hawaii.

In testimony whereof I, John Hay, Secretary of State of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed.

[SEAL]

Done at the City of Washington this 25th day of June, A. D. 1900, and of the Independence of the United States of America the One Hundred and Twenty-fourth.

JOHN HAY.

WHEREAS, by the seventy-third section of an act entitled "An Act to provide a government for the Territory of Hawaii," approved April 30th, 1900, it was, among other things, provided as follows: "That subject to the approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian Government in conformity with the laws of Hawaii, between the 7th day of July, 1898, and the 28th day of September, 1899, are hereby ratified and confirmed;" and,

WHEREAS, it appears by the certificate of Sanford B. Dole, President of the Republic of Hawaii, which certificate bears date the 23rd day of May, A. D. 1900, that the Honolulu Rapid Tran-

sit & Land Company, organized under an act entitled, "An Act to authorize and provide for the construction, maintenance and operation of a street railway or railways in the district of Honolulu, Island of Oahu," was incorporated on the 30th day of August, A. D. 1898, under a charter of incorporation, a copy whereof is attached to said certificate; and that said incorporating and granting of said charter of incorporation were made in conformity with the general incorporating acts of the Republic of Hawaii, and that the granting of the franchise conferred thereby, and all acts done and proceedings taken in the premises were done and proceedings taken in conformity with the laws of the Republic of Hawaii;

NOW, THEREFORE, in conformity to the provision of the act aforesaid, the said franchise granted by the Hawaiian government to the Honolulu Rapid Transit & Land Company is hereby approved.

WILLIAM MCKINLEY.

THE REVISED LAWS OF HAWAII, 1905.

SECTION 1212. *Property Tax.* Except as otherwise provided, all real property and all personal property within the Territory shall be subject to an annual tax of one per cent. upon the full cash value of the same.

SECTION 1216. *Basis of value of taxation.* All real and personal property and the interest of any person in any real or personal property shall be assessed separately as to each item thereof for its full cash value.

Provided, however, that in all cases where real and personal property or several classes or kinds or parcels of real or personal property respectively, are combined and made the basis of an enterprise for profit, the combined property forming such basis of such enterprise for profit, shall be assessed as a whole on its fair and reasonable aggregate value.

Provided also, that the combined property of every corporation holding a public utility franchise and occupying the public streets or highways of the Territory, other than any such corporation that by the terms of its franchise is required to pay a percentage of its gross income to the Territory, shall be valued and assessed at not less than the total amount of the par value of the capital issues emitted by such corporation.

In estimating the aggregate value of each such enterprise for profit, there shall be taken into consideration the net profits made by the same, also the gross receipts and actual running expenses; and where it is a company being a corporation whose stock is quoted in the market, the market price thereof, as well as all other facts and considerations which reasonably and fairly bear upon such valuation.

In ascertaining the agregate value of the property constituting the basis of an enterprise for profit for the purpose indicated by this Section, there shall first be included all property combined and forming the basis of such enterprise whether within the definition of real or personal property set forth in this chapter or not, and there then shall be deducted therefrom the value of shares in other Hawaiian corporations, held or owned by such enterprise, the value of all property on which specific taxes are levied and the value of all property that would not be taxable if not so combined and made the basis of an enterprise for profit. And ————— * * * (amended Act 88 of Laws of 1905.)

SECTION 1243. *Notice of raise in value.* In case any assessor shall raise the valuation of any property above the value stated in the assessment return in this chapter provided for, or shall refuse to allow a claim for exemption, such assessor shall, on or before April 1 of each year, send a written or printed notice by depositing the same in the Post Office, postage prepaid, addressed to the last known place of residence of the person making the return or claiming the exemption, describing the property, the valuation of which has been so raised, and stating the proposed assessment thereof, or stating the exemption refused, as the case may be.

SECTION 1244. *Tax list open to public.* It shall be the duty of each assessor or his deputy to attend on all days except Sundays between May 1 and May 15, both inclusive, of each year, at some convenient place or places in his division or district, between the hours of eight o'clock in the forenoon and five o'clock in the afternoon with his assessment or tax list, which shall during such times be open for the inspection of all persons liable to taxation in the district without fee or reward.

Written or printed notice of such places shall be given by advertisement in a weekly newspaper, and by posting a notice in at least eight conspicuous places in each district of the times and places at which such tax lists shall be open for inspection in such district.

SECTION 1248. *Appeal court, appointment.* Three suitable persons shall be appointed by the governor of the Territory of Hawaii, for each judicial circuit, to hold office for one year, who shall respectively constitute courts of appeal to hear and determine all appeals and objections duly taken under this chapter, in their several circuits; *provided*, however, that no assessor or his deputy shall be appointed to sit as a member of any such court of appeal.

SECTION 1254. *Tax list to conform to decision.* The assessor shall alter or amend the taxation list and copy thereof, in conformity with the decision of the court.

APPEAL TO SUPREME COURT.

SECTION 1255. *How made.* If any tax appeal court shall reduce the valuation of any property below the valuation placed

thereon by the assessor, or shall value the property at a greater valuation than that placed thereon in his tax return by the person making the return thereof, the tax assessor or the taxpayer, as the case may be, may at any time within twenty days appeal to the supreme court from such decision of such tax court, by filing a notice of appeal, and if the appellant is the taxpayer, depositing with the chairman of such court the sum of one hundred dollars, or file in lieu thereof a bond with sufficient surety to the clerk of the supreme court in the sum of one hundred dollars, conditioned to pay all costs of such appeal in case the same is not sustained.

SECTION 1256. *Certificate of.* Upon any appeal being perfected as aforesaid the chairman of the tax appeal court from which such appeal is taken shall immediately certify up to the supreme court the record of all proceedings had before such tax appeal court, in and concerning such cause, in which certificate there shall be set forth:

1. The valuation of the property in dispute, claimed by the assessor;
2. The valuation of the same, claimed by the taxpayer;
3. The valuation placed thereon by the tax appeal court.

Such certificate shall be accompanied by a copy of the evidence taken before such tax appeal court and the decision of such court in such cause.

SECTION 1257. *Evidence.* Upon any appeal to the supreme court under the provisions of this chapter, the evidence taken before the tax appeal court in connection with such appealed cause, shall be considered by the supreme court, and it may also in its discretion allow further evidence to be introduced by either party.

CHAPTER 99

OF THE REVISED LAWS OF HAWAII AS AMENDED BY ACT 87 SESSION LAWS 1905.

INCOME TAX.

SECTION 1278. *Rate on person's income.* There shall be levied, assessed, collected and paid annually upon the gains, profits and income over and above One Thousand Dollars, derived by every person residing in the Territory of Hawaii, from all property owned, and every business, trade, profession, employment or vocation, carried on in the Territory, and by every person residing without the Territory from all property owned, and every business, trade, profession, employment or vocation carried on in the Territory, and by every servant or officer of the Territory,

wherever residing, a tax of two per cent. on the amount so derived during the taxation periods as herein defined, provided that the exemption for the first taxation period shall be only Five Hundred Dollars.

The taxation period within the meaning of this chapter shall be the year immediately preceding the first day of January of each year, in which such tax is payable, except that the first taxation period shall be the half-year immediately preceding the first day of January, 1906.

SECTION 1279. *On corporation income.* There shall be levied, assesed, collected and paid annually, except as hereinafter provided, a tax of two per cent. on the net profits or income above actual operating and business expenses derived during the first taxation period and each succeeding taxation period, from all property owned, and every business, trade, employment or vocation, carried on in the Territory of Hawaii, of all corporations, doing business for profit in the Territory, no matter where created or organized; *provided*, however, that nothing herein contained shall apply to corporations, companies or associations, conducted solely for charitable, religious, educational or scientific purposes, including fraternal beneficiary societies, nor to insurance companies, taxes on a percentage of the premiums under the authority of another law.

SECTION 1280. *Income includes what.* In estimating the gains, profits and income, of any person or corporation, there shall be included all income, derived from interest upon notes, bonds and other securities, except such bonds of the Territory of Hawaii or of municipalities created by this Territory, the principal and interest of which, are by the law of their issuance exempt from all taxation; profits realized within the taxation period whether that period be the first taxation period or any succeeding taxation period from sales of real setate, including leaseholds purchased within two years; dividends upon the stock of any corporation; the amount of all premiums on bonds, notes or coupons; the amount of sales of all movable property, less the amount expended in the purchase or production of the same, and in the case of a person not including any part thereof consumed directly by him or his family; money and the value of all personal property acquired by gift or inheritance and all other gains, profits and income derived from any source, whatsoever, during said taxation period.

SECTION 1281. *Income, how computed.* The net profits or income of all corporations shall include the amounts paid or payable to, or distributed or distributable among shareholders from any fund, or used for construction, enlargement of plant, or any other expenditure or investment, paid from the net profits, made or acquired by said corporation, during the taxation period next preceding, whether that period be the first taxation period or any succeeding period.

In computing incomes the necessary expenses actually incurred in carrying on any business, trade, profession or occupation, or in managing any property shall be deducted and also all interest paid by such person or corporation on existing indebtedness. And all government taxes, and license fees, paid within the taxation period next preceding whether that period be the first taxation period or any succeeding taxation period shall be deducted from the gains, profits or income of the person who, or the corporation which, has actually paid the same, whether such person or corporation be owner, tenant or mortgagor; also all losses actually sustained during the taxation period next preceding, whether that period be the first taxation period or any succeeding taxation period, incurred in trade, or arising from losses by fire not covered by insurance, or losses otherwise actually incurred.

Provided, that no deduction shall be made for any amounts paid out for new buildings, permanent improvements or betterments, made to increase the value of any property or estate.

Provided, further, that no deduction shall be made for personal or family expenses, the exemption of Five Hundred Dollars for the first taxation period and One Thousand Dollars for each taxation period thereafter, mentioned in Section 1278, being in lieu of the same.

Provided, further, that where allowable under this Chapter, only one deduction of Five Hundred Dollars for the first taxation period and thereafter One Thousand Dollars for each taxation period shall be made from the aggregate annual income of all the members of one family, composed of one or both parents and one or more minor children, or husband and wife; that guardians shall be allowed to make a deduction in favor of each and every ward, except where two or more wards are comprised in one family, in which case the aggregate deduction in their favor shall not exceed Five Hundred Dollars for the first taxation period and One Thousand Dollars for each taxation period thereafter.

Provided, further, that in assessing the income of any person or corporation there shall not be included the amount received from any corporation as dividends upon the stock of such corporation if the tax of two per cent. has been assessed upon the net profits of such corporation as required by this Chapter, nor any bequests or inheritance otherwise taxed as such.

SECTION 1282. *Corporation returns.* Every corporation doing business for profit in the Territory shall make and render to the Assessor of its tax division, between the first and thirty-first days of January, in each year, beginning with the year 1906, a full return verified by oath or affirmation of its duly empowered officers in such form as the Treasurer of the Territory may prescribe, of all the following matters for the taxation period, ending December 31st, next preceding the date of such return, whether that period be the first taxation period or any succeeding taxation period;

First: The gross receipts of such corporation from sales made at home or abroad and from all kinds of business, of any name or nature;

Second: The expenses of such corporation exclusive of interest, annuities and dividends;

Third: The amount paid on account of interest, annuities and dividends stated separately;

Fourth: The amount expended on permanent improvements;

Fifth: The amount paid in salaries or compensation of more than Three Hundred Dollars to each person employed, during the first taxation period, and of more than Six Hundred Dollars for each person employed during each taxation period thereafter, and the name and amount paid to each.

SECTION 1283. *Individual returns.* It shall be the duty of all persons of lawful age having an income of Five Hundred Dollars or more, for the first taxation period and having an income of One Thousand Dollars or more for any taxation period thereafter, from all sources, and of all corporations made liable to income tax, to make and render a list or return between the first and thirty-first days of January of each year, in such form as the Treasury of the Territory may direct, to the Assessor of the Division in which such persons or corporations reside, locate or do business of the amount of their or its income, gains and profits as aforesaid; and all guardians, trustees, executors, administrators, agents, receivers, and all corporations or persons acting in a fiduciary capacity, shall make or render a list or return as aforesaid to the Assessor of the division in which such person or corporation, acting in a fiduciary capacity resides or does business of the amount of income, gains and profits of any minor or person for whom they act, and the Assessor shall require every list or return to be verified by the oath or affirmation of the person or authorized officer of the corporation making the same.

If any person or corporation refuses or neglects to render such return within the time required as aforesaid, or enters a return which in the opinion of the Assessor is false and fraudulent or contains any understatement, it shall be lawful for the Assessor to summon such person, or any of the officers of such corporation or any person having possession, custody or care of books of accounts containing entries relating to the business of such person or corporation, or any other person he may deem proper, wherever residing or found, to appear before him and produce such books at a time and place named in the summons, and to give testimony or answer interrogations under oath respecting any income liable to tax or the returns thereof. False, wilful testimony given before such Assessor shall be deemed perjury and punishable as such.

SECTION 1284. *Account books to be kept.* It shall be the duty of every person or corporation doing business for profit to keep full, regular and accurate books of accounts upon which all its

transactions shall be entered from day to day in regular order, which books shall be open to the inspection of the assessor of the division or any person authorized by him to inspect the same, during business hours.

SECTION 1285. *False return, etc.: penalty.* When any person or corporation having a taxable income refuses or neglects to render any return or list required by law or decline to take oath or affirmation thereto the Assessor may make such assessments as he may consider just and the same shall be binding and conclusive upon all parties and shall not be subject to appeal. In case of any false or fraudulent return or valuation by any taxpayer the Assessor shall add 200 per cent. to the just valuation of the income of such taxpayer and the amount of the tax assessed on such increase shall become part of the tax on the said income.

SECTION 1286. *Appeal.* Any person or corporation who or which has made a legal return as aforesaid may appeal from the amount assessed to the Tax Appeal Court constituted under Chapter 98, in like manner as allowed in case of property tax appeals and the said court is authorized to hear and determine such appeals subject to the revision of the Supreme Court as provided in the case of property taxes. Where the words "valuation of property" or similar words occur in said Chapter concerning such appeals the words "amount of taxable income" shall be understood in all proceedings in regard to appeals from assessments or judgments in income tax matters. Any person or corporation appealing from the assessment of the Assessor shall lodge with the Assessor on or before the fifteenth day of May, of each year, a notice in writing of his intention to appeal and the grounds of such appeal, and deposit with him the costs of appeal as prescribed in case of property taxes, which costs shall be subject to the regulations prescribed in said Chapter. The said Tax Appeal Court shall sit for hearing tax appeals under the authority of this Chapter between the fifth and twenty-fifth days of July of each year.

SECTION 1287. *Other provisions applicable.* All the powers, authorities and rights to compensation by Chapter 98 conferred on the tax appeal court constituted under the authority of said chapter for hearing and determining appeals duly taken thereunder are conferred on said court for hearing and determining appeals under this chapter, and all the powers, authorities, and duties contained in or enacted by said chapter for levying, assessing, collecting, receiving and enforcing payments of the tax imposed under the authority of said chapter and otherwise relating thereto shall be severally and respectively conferred, practiced and exercised for levying, assessing, collecting and receiving and enforcing payment of the tax imposed under the authority of this chapter, as far as the same shall not be superseded by, and shall be consistent with the express provisions of this chapter, as fully and effectually to all intents and purposes as if the same powers and authorities were repeated and re-enacted in the body of this chap-

ter with reference to said tax, and all and every the regulations of the said chapter, except as aforesaid, shall be applied, construed, deemed and taken to refer to the tax imposed under the authority of this chapter, in like manner as if the same had been enacted in this chapter. The assessments made under the authority of this chapter and the assessment books and delinquent tax lists made in accordance with the provisions of said Chapter 98 shall be prima facie evidence of the correctness of the tax imposed under this chapter in any case.

[redacted]

SUPREME COURT OF THE UNITED STATES

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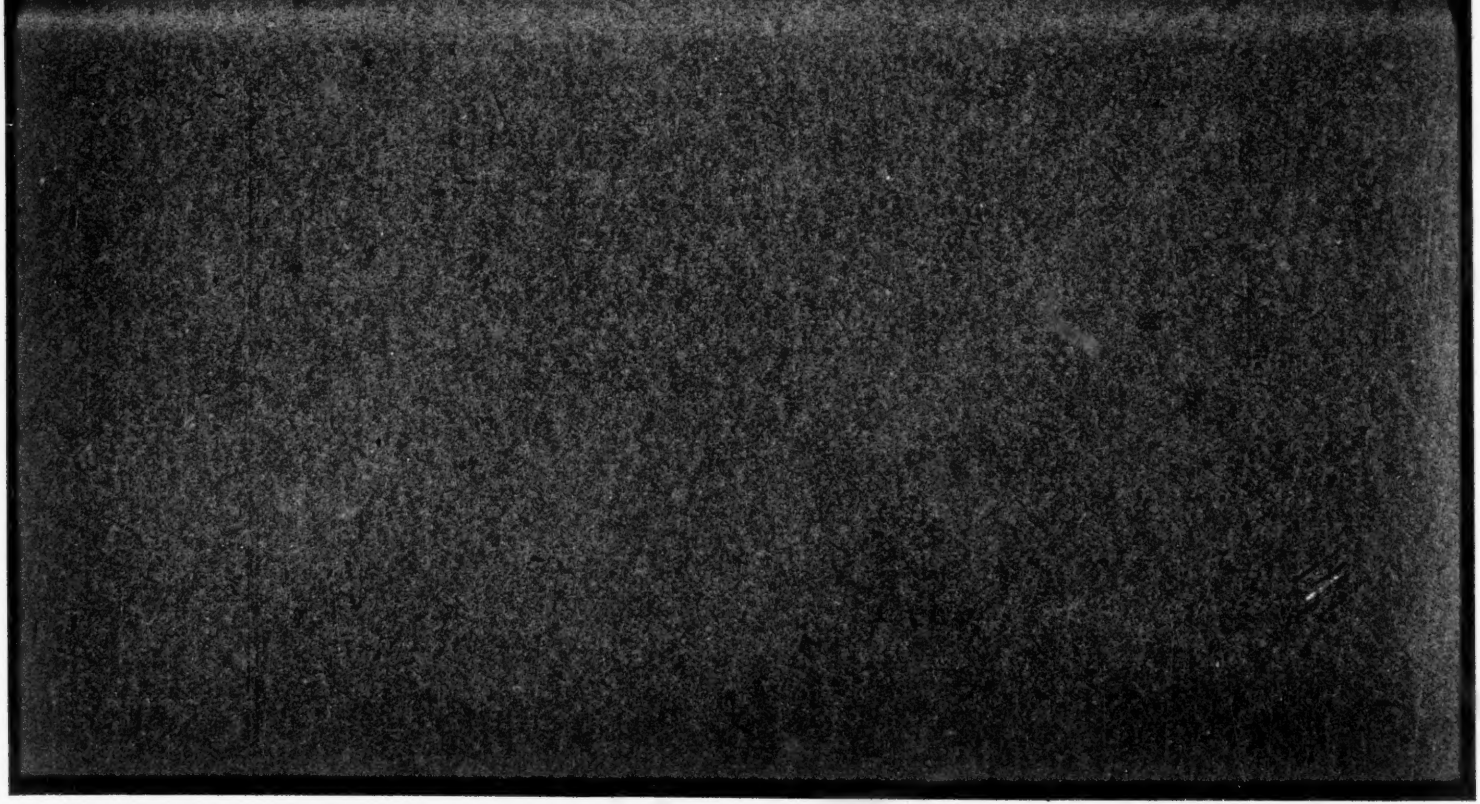

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1907.

No. 234.

HONOLULU RAPID TRANSIT & LAND COMPANY, Plaintiff in Error, vs. JAMES L. HOLT, Tax Assessor, Defendant in Error.	IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

This matter comes on writ of error to the Supreme Court of Hawaii to correct alleged errors in a decision rendered by said Court on October 17, 1906, (Tr. pp. 26-31) sustaining a decision of the Tax Appeal Court of the First Taxation Division which fixed the net taxable income of plaintiff in error at the sum of $29,409.58, (Tr. pp. 23 and 24), thereby disallowing a claim made by plaintiff in error for estimated depreciation in the value of its plant and failing the allowance of depreciation for the same sum, to be allowed as a deduction for the purpose of creating a sinking fund, (Tr. p. 14).

Plaintiff in error as required by Chapter 99 of the Revised Laws of Hawaii, as amended by Act 87 of the Session Laws of 1905, made a return of its income for the period of six months preceding January 1st, 1906, in which it showed its gross income for that period to be $169,296.82
and claimed as deductions $180,822.67
thus showing no income subject to taxation. (Tr. pp. 2-6). This return was not accepted, but the income of plaintiff in error was assessed as follows:

Gross Income	$169,296.82
Deductions and Exemptions.....	139,887.24
Net Income	29,409.58
Tax at 2%	588.19

The only item disallowed by the Assessor and in dispute between the plaintiff and defendant in error was that shown as No. 9 in Schedule B of the return, as follows:

"Written off December 31, 1905, as depreciation in year 1905, $40,935.43." (Tr. pp. 5 and 11).

No claim was made in its return by plaintiff in error for any deduction of any sum carried and charged to its sinking fund. (Tr. pp. 2-7). From the assessment, plaintiff in error appealed to the Tax Appeal Court of the First Taxation Division of the Territory of Hawaii. (Tr. p. 9). The evidence showed upon the hearing before the Tax Appeal Court that the $40,935.43 claimed as a deduction from income for depreciation represented the wear and tear upon the plant for the entire year (Tr. pp. 17, 19 and 20). The plaintiff in error there claimed that if the deduction could not be allowed as depreciation, then it should be allowed as representing earnings which

under its franchise, it had a right to set aside as a sinking fund, (Tr. p. 14), although such earnings had not been set aside except to the extent of $3,448.12. (Tr. p. 17). The Tax Appeal Court sustained the Assessor and fixed the net taxable income of plaintiff in error at the assessed amount, to wit, $29,409.58. (Tr. pp. 23 and 24). From this decision, an appeal was taken to the Supreme Court of Hawaii which, on October 17th, as above stated, affirmed the decision of the Tax Appeal Court, in pursuance of which affirmance, a judgment was entered on November 21st, 1906. (Tr. pp. 26-31). Thereafter, a writ of error issued to the Supreme Court of Hawaii, based upon various assignments of error.

Plaintiff in error is a corporation organized under the laws of the Territory of Hawaii for the purpose of taking over, and it has taken over, a certain street railway franchise granted to certain persons by Acts 69 and 70 of the Session Laws of 1898 (now chapter 66 of the Revised Laws of Hawaii). Under this franchise, it is now operating its railway. The franchise was granted by the Legislature of the Republic of Hawai'i on July 6th, 1898, and approved by the President of the then Republic of Hawaii on July 7th, 1898. The joint Resolution of Congress annexing the Republic of Hawaii to the United States of America was passed and received the approval of the President of the United States on July 7th, 1898, although notice of such fact was not received in Hawaii until a later date. On the 25th of June, 1900, the President of the United States approved and ratified the granting of the franchise referred to under the authority of Section 73 of the Act to Provide a Government for the Territory of Hawaii. (1 Stat. at Large, 141).

There are raised before this court, the following questions:

FIRST: This Court has no jurisdiction because no federal question is herein involved, nor is the jurisdictional amount in controversy.

SECOND: That depreciation, as wear and tear not covered by repairs, should have been allowed under the general laws of Hawaii in ascertaining its net income subject to taxation.

THIRD: That in denying the claim of plaintiff in error for the allowance of said sum of $40,935.43, either as depreciation or if not so allowable, then as earnings which it had a right to carry to a sinking fund, the Supreme Court denied to plaintiff in error the immunities given it in its franchise, which in terms allowed it to deduct said amount and further exempted it from all taxation except that levied upon the completed and equipped portions of its road and a car license tax of $10.00 per annum per car.

FOURTH: That by its decison the Supreme Court of Hawaii denied to plaintiff in error the protection guaranteed by the 5th and 14th of the Amendments to the Constitution of the United States, in that thereby plaintiff in error was deprived of property without due process of law and without just compensation, and denied the equal protection of the laws.

ARGUMENT.

I.

THIS COURT HAS NO JURISDICTION BECAUSE NO FEDERAL QUESTION IS HEREIN INVOLVED NOR IS THE JURISDICTIONAL AMOUNT IN CONTROVERSY.

Plaintiff in error bases its claim to a deduction from earnings representing depreciation:

(1) Upon its construction of the Territorial Income Tax Laws hereinafter set forth in full.

(2) Upon rights claimed to exist under its franchise, to-wit, that its charter is a contract with the Territory under the terms of which it is exempted from taxation, except as to the completed portions of its road and a car license tax of $10.00 per annum upon each car.

(3) If liable to taxation at all upon its income under the Territorial tax law, certain deductions from earnings set forth in Section 851 of the Revised Laws must be allowed in ascertaining its net income subject thereto.

1. The Territorial Supreme Court has uniformally held that under the provision of the Income Tax Act of Hawaii estimated depreciation is not deductable from the earnings for the purpose of ascertaining net income subject to taxation (p. 8 brief).

The Supreme Court of the United States in interpreting the Income Tax Act will be guided by the construction placed thereon by the Supreme Court of the Territory (p. 9 brief).

Even if the construction adopted by the Territorial Supreme Court is erroneous such construction does not present a Federal question.

Central Land Co. v. Laidley, 159 U. S. 103;
Commercial Bank v. Buckingham, 5 How., 317;
Lawler v. Walker, 14 How., 149-154;
Knox v. Exchange Bank, 12 Wallace 379-383.

2. Under its Franchise Act (Acts 69 & 70 of the Session Laws of 1898, now Chapter 66 of the Revised Laws of Hawaii) it is provided that: "Section 30—All material required by the said association and others to be used for the purposes of this Act when imported from the United States and being the product and manufacture of the United States, shall be free of duty, and the property of the said association and others shall not be liable to internal taxation while said railway is under construction, *provided that as fast as completed and equipped*

the completed and equipped portion shall become liable to such taxation."

It is admitted by plaintiff in error that it is operating such road at the present time upon and through the streets of Honolulu. (Tr. p. 33).

The foregoing statute does not contain any express exemption from taxation as to completed portions of the railroad, and as to such completed portions thereof *there appears to be not only no exemption from taxation, but an express provision for taxation.*

There is nothing in the Franchise Act to show that the car license tax of $10.00 per car provided for by Section 31 of said Act was to be in lieu of taxes; in fact, the statute itself seems to demand a contrary construction. Laws of 1898, Chapter 69, Sec. 31; now Sec. 866, Revised Laws—Car License Tax: "Said railway or corporation shall pay in annual payments to the Treasury Department the sum of $10.00 per annum as a license tax upon each passenger car used by it or them, *and no greater sum shall be exacted as car license.*"

3. Sec. 851 of the Revised Laws provides that the plaintiff in error may make certain charges against its income. It is apparent from the reading of the Section referred to that the object thereof is to allow certain charges in reduction of income for the purpose of ascertaining a sum in which the Territory of Hawaii is entitled to participate by subdivision 4 of said Section. There is no hint contained in said Section that such charges could be deducted from net earnings for the purpose of showing the income of the corporation subject to taxation.

It is further shown by the record, page 17, that no portion of the sum claimed had actually been deposited in any such sinking fund except the sum of $3,348.00.

Taxation is the rule and exemption therefrom the exception.

Every presumption is against exemptions from taxation, a doubt is fatal to the claim.

Theological Seminary v. Ill., 188 U. S. 662, 672;
New Orleans City & Lake Ry. v. New Orleans, 143 U. S. 192;
Memphis Gaslight Company v. Shelby Co., 109 U. S. 398;
Chicago B. K. C. R. v. Guffey, 120 U. S. 569;
Atl. & Pac. Ry. Co. v. Lesueur, 1 L. R. A., 244;
Vicksburg Ry. Co. v. Dennis, 116 U. S. 655-668;
Bank of Commerce v. Tenn., 161 U. S. 134-146;
Ford v. Delta & Pine Land Co., 164 U. S. 662-666;
Hoge v. R. R. Co., 99 U. S. 348-355.

This Court will not assume jurisdiction in every cause when a Federal question is *raised*. *The Federal question must be involved in the decision of the Court below.* The mere assertion of a Federal right and its denial does not justify this Court in assuming jurisdiction where it appears that such right is frivolous and without merit.

Kent v. Porto Rico, decided Nov. 18, 1907, advance sheets No. 31, Oct. Term 1907.
American Ry. Co. v. Castro, 204 U. S., pp. 453-455;
Newburyport Water Co. v. Newburyport, 193 U. S., pp. 561-576;
St. Joseph & Grand Island R. R. v. Steele, 167 U. S., pp. 659-662;
Arnado v. United States, 195 U. S., pp. 172-175.

II.

UNDER THE INCOME TAX LAWS OF HAWAII ESTIMATED DEPRECIATION OF PROPERTY CANNOT BE DEDUCTED FROM GROSS INCOME.

The Sections of the Income Tax Law covering the question of what income shall include and what deductions shall be allowed, are as follows:

> "Sec. 1279. On Corporation Income. There shall be levied, assessed, collected and paid annually, except as hereinafter provided, a tax of two per cent. on the net profit or income above actual operating and business expenses derived during the first taxation period and each succeeding taxation period, from all property owned, and every business, trade, employment or vocation, carried on in the Territory of Hawaii, of all corporations, doing business for profit in the Territory, no matter where created or organized; provided, however, that nothing herein contained shall apply to corporations, companies or associations, conducted solely for charitable, religious, educational or scientific purposes, including fraternal, beneficiary societies, nor to insurance companies taxed on a percentage of the premiums under the authority of another law."

> "Sec. 1280. Income Includes What. In estimating the gains, profits and income, of any person or corporation, there shall be included all income, derived from interest upon notes, bonds and other securities, except such bonds of the Territory of Hawaii or of municipalities created by this Territory, the principal and interest of which, are by the law of their issuance exempt from all taxation; profits realized within

the taxation period whether that period be the first taxation period or any succeeding taxation period from sales of real estate, including leaseholds purchased within two years; dividends upon the stock of any corporation; the amount of all premiums on bonds, notes or coupons; the amount of sales of all movable property, less the amount expended in the purchase or production of the same, and in the case of a person not including any part thereof consumed directly by him or his family; money and the value of all personal property acquired by gift or inheritance and all other gains, profits and income derived from any source, whatsoever, during said taxation period."

"Sec. 1281. INCOME, HOW COMPUTED. The net profits or income of all corporations shall include the amounts paid or payable to, or distributed or distributable among shareholders from any fund, or used for construction, enlargement of plant, or any other expenditure or investment, paid from the net profits, made or acquired by said corporation, during the taxation period next preceding, whether that period be the first taxation period or any succeeding period.

In computing incomes the necessary expenses actually incurred in carrying on any business, trade, profession or occupation, or in managing any property shall be deducted and also all interest paid by such person or corporation on existing indebtedness. And all government taxes and license fees, paid within the taxation period next preceding whether that period be the first taxation period or any succeeding taxation period shall be deducted from the gains, profits or income of the person who, or the corporation which, has actually paid the same, whether such person or cor-

poration be owner, tenant or mortgagor; also all losses actually sustained during the taxation period next preceding, whether that period be the first taxation period or any succeeding taxation period, incurred in trade, or arising from losses by fire not covered by insurance, or losses otherwise actually incurred.

Provided, that no deduction shall be made for any amounts paid out for new buildings, permanent improvements or betterments, made to increase the value of any property or estate. * * * * * * * *

"Sec. 1282. Corporation Returns. Every corporation doing business for profit in the Territory shall make and render to the Assessor of its tax division, between the first and thirty-first days of January, in each year, beginning with the year 1906, a full return verified by oath or affirmation of its duly empowered officers in such form as the Treasurer of the Territory may prescribe, of all the following matters for the taxation period, ending December 31st next preceding the date of such return, whether that period be the first taxation period or any succeeding taxation period;

First: The gross receipts of such corporation from sales made at home or abroad and from all kinds of business, of any name or nature;

Second: The expenses of such corporation exclusive of interest, annuities and dividends;

Third: The amount paid on account of interest, annuities and dividends stated separately;

Fourth: The amount expended on permanent improvements;

Fifth: The amount paid in salaries or compensation, of more than Three Hundred Dollars to each person employed, during the first taxation period, and of more than Six Hundred Dollars for each person employed during each taxation period thereafter, and the name and amount paid to each."

The Income Tax Law of Hawaii is a territorial statue and thereunder the Territorial Supreme Court has uniformally held that estimated depreciation cannot be deducted from earnings in ascertaining net income subject to taxation.

In re Assessment Income Tax, Ewa Plantation Co., decided January 13th, 1908;

Re Tax Appeal Honolulu Rapid Transit & Land Co., 18 Hawn., p. 15;

Re Tax Appeal Hawaiian Commercial & Sugar Co., 14 Hawn., p. 601;

Rehearing Tax Appeal Hawaiian Commercial & Sugar Co., 14 Hawn., p. 687;

Re Tax Appeal Wilder S. S. Co., 16 Hawn., pp. 567-574.

This Court will not review rulings of the Territorial Supreme Court construing territorial statutes not in conflict with the laws or statutes of the United States.

Wilson v. Standefer, 184 U. S. 399-412;

Elmendorf v. Taylor, 10 Wheat. 153-159;

Railroad Co. v. Trust Co., 174 U. S. 99-107;

Green v. Lessee of Neal, 6 Peters 291-297;

Smith v. Jennings, 206 U. S. 276;

Burt v. Smith, 203 U. S. 129-135;

Haire v. Rice, 204 U. S. 291.

The real point at issue before the Tax Appeal Court and the Supreme Court was not, whether depreciation could be de-

ducted from earnings in estimating net income for taxation purposes under the Territorial Act, *but when it could be deducted.*

That depreciation when representing an actual loss during the preceding taxation period can be deducted from earnings in ascertaining net income for such purpose, has been repeatedly held by the Supreme Court of Hawaii.

In re Assessment of Taxes, 15 Hawn. 502;

and as hereinbefore set forth the Supreme Court of Hawaii has uniformly held that in order to be deductible, such depreciation must represent *a loss actually occurring* during the preceding taxation period, *as distinguished from a loss estimated as having taken place* therein.

> Mr. Justice Ballou in delivering the opinion of the Supreme Court of Hawaii in re Income Tax Appeal Ewa Plantation Co., decided January 13th, 1908, 18 Haw. 530, involving this same claim for depreciation under the Territorial Income Tax Law, reviewed at length the history of this legislation and the various Income Tax Acts, both Federal and English, together with decision thereunder as bearing upon the proper construction to be placed upon the local status, the following is quoted from his opinion:

"The language of our statute was largely taken from the Federal Income Tax Law of 1894, which was declared unconstitutional before being construed in detail by the courts. The language of other statutes is so dissimilar that decisions under them afford but little aid. By the English Income Tax Act of 1842, it was provided that the 'duty * * * shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture or adventure or concern upon a fair or just average of three years.' After

the case of *Forder v. Handyside*, L. R. I Exch. Div. 233, denying the right to deduct estimated depreciation, the act was amended in 1878, giving specific authority to the assessors to 'allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern.'" See *Cunard Steamship Co. v. Coulson* (1899), I Q. B. 865.

In the United States, on the other hand, the legislative tendency seems to have been against the allowance of estimated depreciation. By the Act of June 30, 1864, Sec. 122, 13 Stat. 284, amended by Act of July 13, 1866, 14 Stat. 139, certain enumerated companies that had paid interest on indebtedness or "that may have declared any dividend * * * as part of the earnings, profits, income or gain of such company, and all profits of such company carried to the account of any fund or used for construction, shall be subject to and pay a tax of five per cent. on the amount of all such interest, or coupons, dividends or profits." Under the general language of this section the supreme court allowed a deduction of such losses by depreciation, though estimated, as actually occurring during the period covered by the petition. The amounts had been written off by the railroad to profit and loss and it is not clear from the reports how the loss occurred, nor does it appear that there was any claim for the depreciation of the entire roadway, rolling stock, etc., of the company, the main item being for the depreciation of one connecting track. *Little Miami, etc., Railway Co. v. United States*, 108 U. S. 277.

In *Grant v. Hartford and New Haven Railroad Co.*, 93 U. S. 225, there are also references to depreciation, although the actual decision was to allow the value of an old bridge which had been replaced as a current expense, which would be in-

consistent with a previous allowance of its value by a system of yearly depreciation.

The corresponding section of the income tax law of 1894, however, assesses the tax "on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses and interest on bonded and other indebtedness." Act of August 27, 1894, Sec. 32, 28 Stat. 556. It will be observed that this language is very different from that under which the previous cases were decided, and in effect prescribes the replacement system.

In similar manner the provision for estimating personal incomes has been altered from the general language of Sections 116 and 117 of the Act of June 30, 1864, by confining necessary expenses to those "actually incurred" and expressly excluding "all estimated depreciation of values and losses within the year on sales of real estate purchased within two years." Act of August 27, 1894, Sec. 28. This exclusion of all estimated depreciation of values first appearing in the Act of March 2, 1867, ch. 13, and again in Act of June 14, 1870, Sec. 9, in the latter case disconnected from the somewhat confusing reference to losses on real estate. In Foster and Abbott, Income Tax Law of 1894, each provision of the Act is annotated with the corresponding provisions of previous statutes, and an examination of the development of the law strengthens the impression that the intent of the latest statute was to confine deductions to actual cash replacements.

III.

THE SUPREME COURT OF HAWAII DID NOT ERR IN HOLDING THAT UNDER ITS FRANCHISE, PLAINTIFF IN ERROR WAS NOT ENTITLED TO THE ALLOWANCE OF THE SUM OF $40,935.43, EITHER AS DEPRECIATION OR AS EARNINGS WHICH IT COULD CARRY TO A SINKING FUND, NOR DID SAID COURT ERR IN HOLDING PLAINTIFF IN ERROR LIABLE TO TAXATION OTHER THAN THAT LEVIED UPON THE COMPLETED AND EQUIPPED PORTIONS OF ITS ROAD AND A CAR LICENSE TAX OF $10.00 PER ANNUM.

The provisions of the franchise of plaintiff in error, under which it makes its claim to the desired exemption, are as follows:

Sec. 17, Chapter 69, Laws 1898, now Sec. 851 R. L.:

"Sec. 851. CHARGES ON INCOME. The following charges shall be lawful upon the income of said railway:

1. The expense of operating, repairs, renewals, extensions, interest, and every other cost and charge properly or necessarily connected with the maintenance and operation of said railway;

2. Dividends may be paid to the stockholders not to exceed eight per cent. on the par value of the stock issued;

3. A sinking fund may be created for the redemption of any bond which may be issued or other record debt and the capital upon the expiration of the franchise; provided, however, that the amount placed to the credit of such sinking fund annually shall not exceed in amount such a sum, with interest computed at

five per cent. per annum, compounded ,as will, principal and interest combined, at maturity, equal the par value of the bonds, record and capital debt aforesaid;

4. The excess of income shall be divided equally between the Territory of Hawaii and the stockholders of said corporation;

5. A quarterly account or trial balance of the corporation shall be rendered by the corporation to the superintendent of public works from the beginning of the actual construction of the railway."

Sec. 30, Chapter 69, Laws 1898, now Sec. 865 R. L.:

"Sec. 865. TAXATION EXEMPTION. The property of the said association and others shall not be liable to internal taxation while said railway is under construction, provided that as fast as completed and equipped the completed and equipped portions shall become liable to such taxation."

Sec. 31, Chapter 69, Laws 1898, now Sec. 866 R. L.:

"Sec. 866. CAR LICENSE TAX. Said railway or corporation shall pay in annual payments to the treasury department the sum of ten dollars per annum as a license tax upon each passenger car used by it or them, and no greater sum shall be exacted as car license."

Rather than exempting from taxation the income of plaintiff in error, the foregoing sections expressly provide that the property of plaintiff in error shall become liable to internal taxation as fast as completed and equipped.

While a tax on income is in a certain sense, a tax upon the property producing the income, in the case at bar such income

must of necessity have been derived from the completed portions of the railway of plaintiff in error, as to which completed portions taxation is expressly provided for.

The car license tax imposed by Section 866 R. L., above quoted, is not expressly or impliedly in lieu of other taxation.

The charges against income provided for by Section 851 R. L., above quoted, are for the purpose of ascertaining the fund in which the Territory has a right to participate and cannot be considered or construed as providing for certain deductions from gross income, nor to arrive at the amount of the net income of plaintiff in error which would be subject to taxation.

It was the contention of the plaintiff in error that for taxation purposes it was entitled to deduct from its earnings for the purpose of ascertaining net income the various "charges on income" included in Section 17, Chapter 69, Laws of 1898, now Section 851 Revised Laws.

By subdivision 1 of said Section, the Plaintiff in error is given the right to deduct the cost of renewals. Even admitting for the sake of argument that plaintiff in error is entitled to make the deductions claimed from income for taxation purposes, yet it can hardly be argued that it is entitled to deduct both renewals and depreciation, covering as they necessarily must, the same loss.

IV.

PLAINTIFF IN ERROR HAS NOT, BY THE LAWS OF HAWAII OR THE DECISION OF THE SUPREME COURT THEREOF, BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW AND WITHOUT JUST COMPENSATION, NOR HAS IT BEEN DENIED THE EQUAL PROTECTION OF THE LAWS.

The income tax laws of Hawaii provide for a notice of raise in the tax payer's return from which the tax payer has a right of appeal to the Tax Appeal Court and from that Court to the Supreme Court of the Territory.

APPEAL.

"Section 1286: Any person or corporation who or which has made a legal return as aforesaid may appeal from the amount assessed to the Tax Appeal Court constituted under Chapter 98, in like manner as allowed in case of property tax appeals and the said Court is authorized to hear and determine such appeals subject to the revision of the Supreme Court as provided in the case of property taxes. Where the words 'valuation of property' or similar words occur in said Chapter concerning such appeals the words 'amount of taxable income' shall be understood in all proceedings in regard to appeals from assessments or judgments in income tax matters. Any person or corporation appealing from the assessment of the Assessor shall lodge with the Assessor on or before the fifteenth day of May, of each year, a notice in writing of his intention to appeal, and the grounds of such appeal, and deposit with him the costs of appeal as prescribed in case of property taxes, which costs shall be subject

to the regulations prescribed in said chapter. The said Tax Appeal Court shall sit for hearing tax appeals under the authority of this Chapter between the fifth and twenty-fifth days of July of each year."

OTHER PROVISIONS APPLICABLE.

Section 1287: All the powers, authorities and rights to compensation by Chapter 98 conferred on the Tax Appeal Court constituted under the authority of said chapter for hearing and determining appeals duly taken thereunder are conferred on said Court for hearing and determining appeals under this chapter, and all the powers, authorities and duties contained in or enacted by said chapter for levying, assessing, collecting, receiving and enforcing payments of the tax imposed under the authority of said chapter and otherwise relating thereto shall be severally and respectively conferred, practiced and exercised for levying, assessing, collecting and receiving and enforcing payment of the tax imposed under the authority of this chapter, as far as the same shall not be superseded by, and shall be consistent with the express provisions of this chapter, as fully and effectually to all intents and purposes as if the same powers and authorities were repeated and reënacted in the body of this chapter with reference to said tax, and all and every the regulations of the said chapter, except as aforesaid, shall be applied, construed, deemed and taken to refer to the tax imposed under the authority of this chapter, in like manner as if the same had been enacted in this chapter. The assessments made under the authority of this chapter and the assessment books and delinquent tax lists made in ac-

cordance with the provisions of said Chapter 98 shall be prima facie evidence of the correctness of the tax imposed under this chapter in any case.

The following sections of the Revised Laws of Hawaii being a part of and comprised within Chapter 98 thereof as amended by Acts 88, 89 and 101 of the laws of the Territory of Hawaii, passed by the legislature at its regular extra session in the year 1905, are by reference made a part of the income tax law, to-wit, Chapter 99 of said Revised Laws as amended by Act 87.

NOTICE OF RAISE IN VALUE.

Section 1243: In case any assessor shall raise the valuation of any property above the value stated in the assessment return in this chapter provided for, or shall refuse to allow a claim for exemption, such assessor shall, on or before April 1 in each year, send a written or printed notice by depositing the same in the Post Office, postage prepaid, addressed to the last known place of residence of the person making the return or claiming the exemption, describing the property, the valuation of which has been so raised, and stating the proposed assessment thereof, or stating the exemption refused, as the case may be.

Section 1255: If any Tax Appeal Court shall reduce the valuation of any property below the valuation placed thereon by the assessor, or shall value the property at a greater valuation than that placed thereon in his tax return by the person making the return thereof, the tax assessor or the tax payer, as the case may be, may at any time within twenty days appeal to the Supreme Court from such decision of such Tax Appeal Court, by filing a notice of appeal, and if the appellant is the tax payer, depositing with the chairman of such Court the sum of One Hundred Dollars, or file in lieu thereof a bond with sufficient surety to the Clerk of the Supreme Court in the sum of One Hundred Dollars, conditioned to pay all costs of such appeal in case the same is not sustained.

CERTIFICATE OF APPEAL.

Section 1256: Upon any appeal being perfected as aforesaid the chairman of the Tax Appeal Court from which such appeal is taken shall immediately certify up to the Supreme Court the record of all proceedings had before such Tax Appeal Court, in and concerning such cause, in which certificate there shall be set forth:

1. The valuation of the property in dispute, claimed by the assessor;

2. The valuation of the same, claimed by the tax payer;

3. The valuation placed thereon by the Tax Appeal Court.

Such certificate shall be accompanied by a copy of the evidence taken before such Tax Appeal Court and the decision of such Court in such cause.

EVIDENCE.

Section 1257: Upon any appeal to the Supreme Court under the provisions of this chapter, the evidence taken before the Tax Appeal Court in connection with such appealed cause, shall be considered by the Supreme Court, and it may also in its discretion allow further evidence to be introduced by either party.

The jurisdiction of this court to review judgments of the courts of the Territory of Hawaii is more restricted than its jurisdiction to review the judgments of the courts of other organized territories, and is to be measured by the power conferred upon this court to review the judgments of state courts.

U. S. Revised Statutes, Sec. 708;

Equitable Life Assurance Society v. Brown, 187 U. S. 308;

Central Land Company v. Laidley, 159 U. S. 103, 110;

Ex parte Wilder S. S. Co., 183 U. S. 545.

In *Commercial Bank v. Buckingham*, 5. How. 317-343, the Court said: "It is the peculiar province and privilege of the State Courts to construe their own statutes; and it is no part of the functions of this Court to review their decisions or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States and not for the correction of alleged errors committed by their judiciary."

The same doctrine is stated by Mr. Justice Harlan, speaking for this Court, as follows in *Lehigh Water Co. v. Easton*, 121 U. S. 388-392:

"The State Court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which, in our opinion, is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong; but, in neither of such cases, would the judgment be reviewable by this Court under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the state constitution or some legislative enactment of the State, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question."

It cannot be said that the parties to a judicial proceeding have been deprived of due process of law when they have been fully heard in the regular course of such judicial proceedings; an erroneous decision of a State Court does not deprive the unsuccessful party of his property without due process of law.

Walker v. Saulvinet, 92 U. S. 90;

Head v. Amoskeag Manufacturing Co., 113 U. S. 9;

Morley v. Lake Shore Ry. Co., 146 U. S. 162;
Bergemann v. Backer, 157 U. S. 655;
Central Land Co. v. Laidley, Supra.

These statutes of the Territory of Hawaii providing for the assessment of income taxes and notification to the tax payer of such assessment, as well as those statutes which confer upon said tax payer the right to appeal from the assessment of the Assessor to the Tax Appeal Court and to the Supreme Court of the Territory are heretofore quoted at length and it is respectfully submitted certainly constitute within the meaning of the constitutional provision, due process of law. The Federal Supreme Court will not consider whether in each particular case an appellant has been given the constitutional guarantee of due process of law, but will consider whether the act in question if carried out in accordance with its terms, would provide such due process.

Kennard v. Louisiana, 92 U. S. 480;
Murrow v. Brinkley, 129 U. S. 178;
Corry v. Campbell, 154 U. S. 629;
Davis v. Texas, 139 U. S. 651.

It is therefore respectfully contended:

1st. That the jurisdictional amount is not in controversy.

2nd. That the construction placed by the Territorial Supreme Court upon the Income Tax Law of Hawaii is correct, but even if not so, such construction does not raise a Federal question.

3rd. That the income of plaintiff in error is not exempt from taxation, either under its franchise or under the provisions of such income tax law.

4th. That the judgment of the Supreme Court of Hawaii

should be affirmed and the writ of error issued herein be dismissed.

Dated Honolulu, Feb. 24, 1908.

Respectfully submitted,

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